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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Thomas E. Keane, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 18, 1975.

OPINION BELOW

The opinion of the Court of Appeals, reported in 522 F.2d 534, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 18, 1975. A timely petition for rehearing with suggestions for rehearing *en banc* was denied on October 20, 1975. On application duly made, the time for filing a petition for a writ of certiorari was extended to December 19, 1975. This petition has been timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant's Fifth and Sixth Amendment rights of due process, confrontation and cross-examination are violated by the extensive use of a "business record" containing multiple hearsay conversations when the purported declarants are available but not called by the government, and where the content of the hearsay conversations furnish the only evidentiary support for a vital and pervasive element of the government's proof?

2. Whether the elevation in this case of vague state standards of ethical conduct to fluid standards of criminal conduct under the Mail Fraud Act deprived petitioner of due process of law?

3. Whether the prosecution in this case, especially in view of its reliance on state ethical standards, encourages intrusion into delicate areas of a state's administration of purely local procedures and shifts massively the authority given the federal government over local affairs?

4. Whether, in considering the various aspects of the alleged scheme, the court below, in sustaining the conviction, ignored the test that, even on appeal, there must be "substantial evidence" to sustain a conviction in a criminal case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Amendment V.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law; . . ."

B. Amendment VI.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

C. United States Code, Title 28, §1732. Record made in regular course of business.

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. . . ."

D. United States Code, Title 28: Federal Rule of Evidence, §803—Hearsay Exceptions—Availability of Declarant Immaterial.

> "(6) **Records of regularly conducted activity.** A memorandum . . . made at or near the time by, or from information transmitted by, a person with knowl-

edge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, . . . all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . ."

STATEMENT OF THE CASE

Petitioner, a lawyer since 1932, was, from 1945, an elected alderman of the City of Chicago and Chairman of its Council's Finance Committee.

In 1965, petitioner, with two others (Hennessey, Sr., a longtime specialist and investor in delinquent special assessment bonds, and Schwartz, a lawyer-real estate investor), formed a partnership ("Alpine") to purchase long tax delinquent, vacant real property at a county scavenger sale to be held pursuant to Illinois statute. The City of Chicago was in no way involved except to the extent that it, and other taxing bodies, might receive an aliquot share of the total amount of tax revenues collected by the County.

Certain realty was acquired by Alpine, through Hennessey, Sr. and its employees, at the scavenger sale. (The legitimacy of the scavenger sale, its procedures and the prices paid by Alpine have never been questioned.) Alpine's acquisitions were financed by legitimate bank loans. Deeds were ultimately obtained through statutory judicial proceedings for those properties which were not redeemed by the titleholders by statutory redemption. The properties were held either in the name of a nominee or placed in land trusts.[1] Special assessment liens (which were in no

[1] Purchase in the name of a nominee was common at the scavenger sale. (T. 703, 1074) A land trust is a recognized and common device for holding title in Illinois when multiple interests are involved and property is used for business purposes. (T. 2923)

way involved in the scavenger sale) were cleared.[2]

These properties were then offered for sale by Alpine. Some were sold to private parties in arm's length transactions. Others were acquired by certain governmental bodies by condemnation or other procedures in which the acquisition prices were based upon independent, federal or other governmental appraisals concerning which no questions have been raised.

In 1974, nine years after Alpine was formed, petitioner was indicted for conspiracy and mail fraud in connection with the above transactions. The first 20 counts of the indictment charged that petitioner, Hennessey, Sr. and Hennessey's son ("Junior"), an employee of Alpine, devised a scheme to defraud the City of Chicago, its citizens and aldermen, of their right to petitioner's loyal, faithful, disinterested and unbiased services and actions in the performance of his official duties, and of their right to have the City's business and affairs conducted honestly, impartially and free from corruption, fraud, undue influence and conflict of interest "in accordance with the laws of the State of Illinois and the City of Chicago . . ." (R. 3, p. 4) A twenty-first count charged conspiracy to commit this fraud. Hennessey and Junior were named as

[2] Special assessments are not taxes. They are, by law, a means of financing local improvements which benefit property without resorting to the City's taxing power, funds or credit. Bonds are issued to the contractor making the improvement. The City acts as a fiscal agent, collecting the assessment from the private property owner and making payment to the bondholder, generally an assignee of the contractor or a subsequent purchaser. The bondholder has no recourse against the City, but may attempt to recover balances due by an action against the property.

unindicted co-schemers and co-conspirators; the third partner, Schwartz, was not charged at all.

Ultimately, petitioner's conviction on fourteen counts of mail fraud and one of conspiracy was affirmed.[3] Petitioner was sentenced to five years imprisonment and fined $27,000 and costs.

Although the prosecution was based upon state conflict-of-interest statutes, which were recited to the jury in the reading of the indictment, in the government's opening statement, as evidence, in the government's closing argument, and, finally, in the court's instructions, the Court of Appeals did not affirm on the ground that petitioner had committed specific violations of state law. Instead, stating that "the [mail fraud] [l]aw puts its imprimatur on . . . accepted moral standards and condemns conduct which fails to match the 'reflections of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society,' " Appendix p. 16, *infra*, the court held that there were three aspects of the scheme upon which the mail fraud convictions under various counts could be predicated:

1. The exertion of undue influence on Charles Swibel, Executive Director of the Chicago Housing Authority ("C.H.A."), an independent governmental agency, "with respect to the sale and attempted sale of certain properties to [Chicago Dwellings Association ("C.D.A."), a not-for-profit corporation]".[4] Appendix, pp. 29-30, *infra*.

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[3] Three counts were withdrawn during trial. Conviction on three others was reversed.

[4] The Court found that "the evidence was insufficient to justify the conclusion that undue influence was used" in connection with sales to another independent agency. Appendix p. 30, *infra*.

2. The use of advance information "with respect to the acquisition [at the scavenger sale] of a significant number of parcels in the 87th and Mackinaw area". (Appendix, p. 18, *infra*.

3. Participation, without disclosure of interest, in City Council proceedings in connection with the clearance of special assessment liens on certain of the properties.

The mailings involved did not pertain directly to exertion of undue influence, use of advance information or participation in City Council procedures, but rather to financing of the original venture, maintenance of land trusts and disposition of properties. Four of the mailings (Counts 8, 14, 15 and 20) concerned a single legitimate arm's-length sale of five lots to United States Steel. The Count 2 mailing was an offer by the City, under threat of condemnation, to purchase a lot. The lots to which these five letters pertained were among those found to be acquired by Alpine "pursuant to advance information about the 87th and Mackinaw development project." Appendix, p. 32, *infra*.

Three mailings (Counts 6, 19 and 4) concerned the disposition of property to private parties, or to an independent governmental body. Some of these properties had been the subject of City Council action. Appendix, p. 32, *infra*.

Count 12 was based on a mailing pertaining to the acquisition of property by C.D.A. which allegedly "was attributable to" petitioner's "use of undue influence on Swibel." Appendix, p. 32, *infra*.

Count 3 was based on a mailing related to the repayment of a bank loan used to finance the acquisitions by Alpine.

Four mailings (Counts 7, 10, 16 and 17) were correspondence with land trustees.[5] Appendix, pp. 34, 35, *infra*.

Although the Court of Appeals classified the alleged scheme into various components and attributed conviction on specified counts to particular aspects of the scheme, no such classification was made for the jury. The jury was not requested to discriminate among counts nor to judge the scheme in this manner. The jury was presented with all the mailings and all the evidence in a confused and undifferentiated mass.

In these circumstances, in which the various aspects of the alleged scheme were so interrelated by the prosecution, if any one aspect falls, the others, too, must fall.

We relate here only those portions of the record concerning the "aspects of the scheme" underpinning the conviction and necessary to an understanding of the questions presented.

Alleged Use of Undue Influence

All of the evidence concerning the charge of undue influence may be summarized as follows:

According to Hennessey, petitioner telephoned Swibel and said, "Charlie, this is Tom Keane. John Hennessey and I own some lots. We would like to have you buy some of them." (T. 494, Appendix, p. 10, *infra*.)

---

[5]As regards Counts 16 and 17, the Court of Appeals stated that these were letters from a bank's trust department *in response* to Hennessey's request for an accounting, thus making the facts appear similar to those in *United States* v. *Joyce*, 499 F.2d 9, 18 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974), wherein defendant requested an accounting from the bank to enable him to keep his records straight. The letters here were from the bank to Hennessey, without initiation by Hennessey, requesting that Hennessey check his records so that the bank could verify its own records. (T. 1088)

Hennessey, at petitioner's direction, then went to Swibel's office. (T. 495). (Petitioner affirmatively denied both the alleged conversation and the direction to Hennessey).

Hennessey testified that he had a two minute conversation with Swibel, during which Hennessey stood while Swibel sat. Hennessey identified himself and stated that petitioner had sent him to sell lots. Swibel was "very curt." Hennessey didn't remember what was said but "walked out . . . with a bad taste in [his] mouth, that [he] wasn't welcome." (T. 496, 766-7).

Independently of the above alleged events, Broderick, a C.D.A. attorney, contacted all county-scavenger-sale purchasers he could find who might have property for sale for use in C.D.A.'s programs. Hennessey was one of those contacted by Broderick. Subsequently, Hennessey gave Broderick a list of available property. Broderick thereafter wrote a letter to Robert A. Snow, director of land acquisition of the C.H.A. (T. 1460). In pertinent part, the letter read:

> "Dear Bob:
>
> Pursuant to Mr. Bach's instructions, I am hereby requesting you to acquire [petitioner's] parcels: [parcels and price omitted].
>
> *Mr. Bach* [executive director of C.D.A.] *informed me that Mr. Swibel told him to purchase these lots as swiftly as possible* and we would use them for the second phase of the Pre-Fab Program." (Emphasis added).

Upon Broderick's mere identification, the above document was admitted as a business record without limitation. No one was produced by the government to testify to either of the alleged conversations related therein. Bach

and Swibel, both of whom were apparently available and had testified before the Grand Jury, but whose testimony was not furnished at any time to petitioner, were not called. No other evidence was introduced on the charge of undue influence.

In closing argument, the government argued that the Broderick letter proved that petitioner actually influenced Swibel, who thereafter successfully coerced Bach, who, in turn, instructed Broderick to request Snow to purchase Alpine lots.[6] Government counsel, after referring to the alleged Hennessey-Swibel conversation and petitioner's "clout", displayed a blow-up of the letter and argued, *inter alia* (T. 3270-3273):

> "It is the summer of 1968. Gerald Broderick was working for the Chicago Dwellings Association, writes a letter to Robert Snow, the Director of Land Acquisitions of the Chicago Housing Authority, and he says:
>
> "'Bock' [sic]—who is his boss at the Chicago Dwellings Association, '. . . informed me that Swibel told him to purchase these lots as quickly as possible as we can use them for the second phase of the prefab program.'
>
> "Ladies and gentlemen, reasonable inference tying this up with the meeting of Charlie Swibel, Charlie Swibel at the bidding of Tom Keane is putting the arm on the Chicago Dwellings Association here to purchase some lots from John A. Hennessey.
>
> • • •
>
> "So what happens, ladies and gentlemen? The Chicago Dwellings Association, as a result of the undue influences exerted by Alderman Thomas Keane on Charlie Swibel, purchases these lots • • •"

[6] There is no evidence that Swibel was Bach's superior or that there was a chain of command from Swibel to Bach to Broderick.

The government further argued to the jury that it was relying on the letter instead of calling Swibel to testify because Swibel was unreliable. The government stated:

> ". . . do you think that we were going to call Mr. Swibel? We have people and we have documents which are a lot more reliable than calling in somebody who is in Mr. Swibel's position. Let them call him." (T. 3373).

The charge of "undue influence" permeated the entire case and was used to buttress all of the government's evidence. In closing argument, the government made, *inter alia*, the following references to petitioner's alleged influence:

> ". . . he is one of the most powerful people in the City Council . . ." (T. 3270); he has "clout" (T. 3270); ". . . when you are dealing with a man as powerful as Tom Keane . . ." (T. 3277); ". . . when you need a little pressure, you bring Tom Keane in." (T. 3279); ". . . but Mr. Keane is somebody special. Mr. Keane is somebody powerful . . ." (T. 3356); Mr. Keane is a "very powerful man—" (T. 3373); Mr. Keane "pulls the strings" in the City Council. (T. 3374.)

Alleged Use of Advance Information

The Court of Appeals held that the charge of mail fraud could be predicated upon petitioner's alleged use of advance information which came to him in his official position. The allegation centered about Alpine's purchase of lots in the 87th and Mackinaw area which was later designated for urban renewal. There was, however, no evidence that *any* information about this area came to petitioner by virtue of his official position.

The only evidence introduced to prove use of advance official information was a conversation between petitioner and Hennessey in April or May, 1966:

> "According to Hennessey's testimony Keane said that they should buy all the lots they could in the 87th and Mackinaw area because the government was going to construct a big project there." Appendix, p. 5, *infra*.

Six months before this conversation, a staff memorandum of the City's Department of Urban Renewal ("D.U.R.") recommending a project in the 87th-Mackinaw development area was released to the press. (T. 1532-33). The Chicago Tribune then published an article stating, *inter alia:*

> "A 35-block area on the southeast side known as Millgate [predecessor designation for the 87th-Mackinaw area], sometimes called one of the city's most rapidly deteriorating areas, will be studied for redevelopment by the Department of Urban Renewal." (T. 1602-1605).

This press release and article capped ten years of highly publicized public discussion concerning necessary urban renewal of the area. (A. 70-5; T. 1532-33, 1583; Govt. Ex. 16-11).

The government's proof of the use of advance official information, therefore, consisted solely of petitioner's statement of a fact which had been public knowledge for six months. There was no proof that petitioner received any advance official information or even that there was any information available other than that which had been made public.

The weakness of the government's proof of the alleged use of advance information was highlighted by the government's argument that since Keane had "clout", he "*somehow* was aware that D.U.R. was interested in the . . . area . . ." (e.g. Govt. Br., 38) (Emphasis added).

The Court of Appeals recognized the weakness in the proof, when it stated:

> "Although the evidence is not overwhelming on the use of advance information charge, and it is possible to interpret the evidence as representing shrewd business judgment on Keane's part, we cannot say that the jury was not entitled to believe that Keane made use of advance information to acquire substantial amounts of property [approximately 30 individual lots] in an area prior to the public announcement indicating that the area was being considered for urban renewal." Appendix, p. 18, *infra*.

No property in this area, however, was acquired "prior to the public announcement."

Alleged Deprivation of Faithful Service

Whether petitioner actually defrauded his colleagues and the public of their "right to . . . faithful service and the right to be advised of material circumstances with regard to the special assessment foreclosures and compromises upon which they voted," Appendix, p. 29, *infra*, requires an understanding of the interrelationships of state statutes, city ordinances and City Council procedural rules and practices. It also requires an understanding of the practice, custom and usage in the Circuit Court of Cook County, the corporation counsel's office and the city comptroller's office pertaining to scavenger property, the levying, collection and distribution of special assessments, the use of special assessment funds and foreclosure proceedings.

Although the Court of Appeals cites certain of the statutes involved, it does not cite all of the statutes necessary to a proper understanding and determination of this issue. Many of the statutes involved have never been interpreted

by local courts, and none of them have been considered in any proceeding resembling the context of the instant case. Certain matters are, however, beyond dispute:

(1) "There does not appear to be a reasonable basis from the exhibits introduced upon which to conclude that properties in which [petitioner] had an interest received any more favorable treatment than other properties that were handled through the 'compromise offer in lieu of foreclosure' procedure." Appendix, p. 8, *infra*, n. 8. This is the only lien clearance procedure in which the City acted without final decision by the Circuit Court of Cook County.

(2) The delinquent special assessment bonds involved were issued at least 40 years ago; there is no evidence that persons other than professional dealers in special assessment bonds held the bonds.

(3) As regards foreclosures, the Circuit Court of Cook County, not the City Council, actually set the minimum bid on a transcribed record made in open court after notice to all interested parties who were entitled to appear and participate in both the judicial procedure setting the minimum bid and the ultimate foreclosure sale. (T. 1088, 1111-1112, 1115-1116.)

(4) The bondholders invariably settled their claims among themselves. (T. 1104-1106, 1195, 2439, 2662, 2663, 2761, 2784).

(5) Everyone involved in special assessment procedures testified that the minimum bid made no difference to the foreclosure price or the return realized by the bondholders. (T. 1104-6, 1195, 2662-3, 2761, 2784, 2765-6, 2444, 2450, 2493).

(6) Although the court below held "it is not clear how these [special assessment] funds are or will be used in the

future, we cannot say that the city has no interest in using them again as it did in the depression or in some other manner," it *is* clear how special assessment funds were used in the past and will be used in the future. By law, these funds may be used *only* to pay bondholders. People v. *Drobnick*, 1 Ill.2d 456, 461 (1963); *City of Park Ridge* v. *Hollis*, 35 Ill.2d 489, 493 (1966).

Although the court held, in effect, that for purposes of the mail fraud statute petitioner's interest, in and of itself, was a material fact and that "Keane should have disclosed his interest" (Appendix, p. 29, *infra*), the aldermen who testified were divided on this issue. Those who demonstrated an understanding of special assessment procedures and foreclosures testified that in these circumstances in which the City had no financial interest and in which the City Council's action was ministerial or *pro forma*, disclosure was not necessary. (T. 2495-2496, 2575, 2579, 2588); those who demonstrated a lack of understanding of foreclosure proceedings or special assessments testified that there should have been disclosure. (T. 1840, 1338-1339, 1348, 1353, 1751, 1757, 1810, 1846, 1824, 1861-1862).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CREATES CONFUSION CONCERNING, AND DISREGARDS CONSTITUTIONAL REQUIREMENTS INVOLVED IN, THE INTERRELATIONSHIP OF THE CONFRONTATION CLAUSE AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

Confrontation and cross-examination of witnesses are basic to the administration of criminal justice in the adversary system. Thus, the evidentiary hearsay rule has not been equated with the confrontation clause. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970). Nor is that clause "a codification of the rules of hearsay and their exceptions as they existed historically at common law." *California* v. *Green*, 399 U.S. 149, 155, 156 (1970).

Here, the Seventh Circuit, relying solely on the "business record" exception to the hearsay rule, permitted a sequence of conversations to be introduced against petitioner by memorandum in total disregard and without consideration of his basic rights to confront and cross-examine the alleged declarants. Appendix, pp. 43-45, *infra*.

Hearsay evidence, justified as an exception to the rule, has, on limited occasion, been received without raising constitutional objections. See *Mattox* v. *United States*, 156 U.S. 237, 244 (1895). However, there has been in those cases an overwhelming argument made for its reliability (either as a result of pre-trial confrontation or otherwise), *Man-*

cusi v. *Stubbs*, 408 U.S. 204 (1972), and a clear showing of the declarant's unavailability. The need for jury evaluation of the declarant's demeanor has been minimal.

There is, no doubt, a trend toward greater use of hearsay evidence and, hence, an erosion of the hearsay rule. Concurrently, however, it is increasingly recognized that the constitutional standards required by the confrontation clause and due process place limitations on receipt of hearsay evidence against an accused.

Under the guidelines required by the confrontation clause, there must be a showing of both great necessity and reliability to enable evidence to be admitted pursuant to a business record exception. ". . . [T]he fact that evidence fits the statutory definition of 'business records' should not of itself determine that it is constitutionally admissible." Jennings, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. of Pa. L. Rev. 741, 763-764 (1965).

The Seventh Circuit, here, has ignored guidelines heretofore recognized. Instead of requiring a showing of nonavailability of witnesses and reliability of testimony, it has put its imprimatur on the use of business record hearsay of alleged declarants without a showing of reliability and nonavailability. The Seventh Circuit, thus, places hearsay and the confrontation clause in absolute congruency.

Moreover, through an expanding hearsay exception, the Seventh Circuit has sanctioned as competent evidence, hearsay testimonial utterances far beyond those heretofore found to be compatible with the constitutional guarantee and has contracted the area in which the right to confrontation may effectively operate.

The problems attendant upon the interrelationship of the confrontation clause and the hearsay rule have been

underscored by the adoption of the Federal Rules of Evidence. The Advisory Committee clearly recognized the issues. See *Advisory Committee's Introductory Note on the Hearsay Problem* reprinted in 4 Weinstein's Evidence, 800-1—800-8 and particularly 800-5, 800-7. Judge Weinstein, in his treatise, further focuses on this issue:

> "What then does the Confrontation Clause mean? Does it impose any limits on the receipt of hearsay evidence against an accused, or are the interests served by the constitutional doctrine so similar to the rationale underlying the hearsay rule that an exception which meets evidentiary tests also satisfies the constitutional standard? The Supreme Court has on numerous occasions expressly rejected the notion that the hearsay rule and the right of confrontation are congruent, though it acknowledges that both protect similar values. (footnote omitted) But it is still far from clear precisely what limits the constitutional doctrine imposes. Part of this uncertainty derives from the fact that the confrontation clause has received relatively little judicial attention until recently.
>
> • • •
>
> ". . . [A] large gray area still exists where it is not clear to what degree the two doctrines overlap." (4 Weinstein's Evidence, 800-19, 800-20).

Even prior to the new rules, the Courts of Appeals have expressed concern as to the interrelationship of the expanding "business records" exception to the hearsay rule and confrontation and due process standards. The Courts of Appeal for four Circuits (Second, Fourth, Fifth and Ninth) have at times expressed doubt that the confrontation clause places any limit upon the business records exception. See, e.g., *United States* v. *Leathers,* 135 F.2d 507, 511 (2d Cir. 1943) (mailing stamps affixed by bank to numerous letters in the ordinary course of business); *Kay* v. *United States,* 255 F. 2d 476, 480, 481 (4th Cir. 1958) (certificate showing alcoholic content of a blood sample); *Hanley* v. *United States,* 416 F.2d 1160, 1167-1168 (5th Cir. 1969) (bank collection slips); *McDaniel* v. *United States,* 343 F. 2d 785, 789 (5th Cir. 1965) (accounting records); *Warren* v. *United States,* 447 F. 2d 259, 262 (9th Cir. 1971) (proof of non-registration of a weapon).

Courts in other circuits hold on the other hand, that the confrontation clause places an absolute limitation on the introduction of evidence under the business records exception. *Phillips* v. *Neil,* 452 F. 2d 337, 347 (6th Cir. 1971) (hospital records read in rebuttal to an insanity defense); *United States* v. *Johns-Manville Corp.,* 225 F.Supp. 61, 63 (E.D. Pa. 1963) (business records generally).

The confusion within the Circuits is apparent in the holding of *McDaniel* v. *United States,* 343 F.2d 785. There, the Fifth Circuit conceded that the trial judge has a duty to determine whether business records are constitutionally admissible under the confrontation clause, but the court weakened this position by stating that the confrontation clause may not be invoked to exclude evidence admissible pursuant to an exception to the hearsay rule. 343 F. 2d 785, 789.

Other courts have recognized in matters involving the "business records" exception that "[t]he Act was not designed • • • to facilitate the introduction of hearsay as to which the reporter, if he appeared in person, would not be allowed to testify." *United States* v. *Burruss,* 418 F.2d 677, 678 (4th Cir. 1969); *United States* v. *Parker,* 491 F.2d 517, 521 (8th Cir. 1973); *United States* v. *Beasley,* 513 F.2d 309, 314 (5th Cir. 1975).

In those instances in which the use of business records has been permitted, the writings contained information

similar to that found in the original "shop books." The information was reliable because of its routineness; its admission was necessary because of the impracticality of determining who, or even how many persons, were responsible for the entry.

In the instant case, the Seventh Circuit, without apparent consideration of the constitutional implications, has gone far beyond routine shop book material and sanctioned the use of a "business record" reciting two conversations involving three persons and has permitted the government the widest latitude in drawing inferences therefrom.[7] The business record was merely identified as such; no one was called to testify concerning the conversations reported therein. The use of this type of memorandum as a substitute for direct testimony to introduce an alleged sequence of conversations negates any constitutional protection.

The use of a document in this manner does more than prevent confrontation of witnesses by the accused. The quest for a verdict inspires "trial by memorandum." Adversary examination is replaced by untested documentary evidence evaluated only by the prosecutor. The opportunity for abuse of prosecutorial discretion is maximized. See *Phillips* v. *Neil*, 452 F.2d 337, 347 (6th Cir. 1971).

The document here admitted was critical to the government's case. It was used for a variety of purposes and as the basis for multiple inferences concerning the alleged use of undue influence. Thus, it, alone, of thousands of documents, was specially enlarged for presentation and argument to the jury.

The government made absolutely no showing of necessity to justify the introduction of the memorandum as a

[7] The constitutional implications of the issue were raised below. (See Keane's Brief, 91-95 and Petition for Rehearing, 13-16.)

substitute for the direct testimony of Bach and Swibel. The government made no effort to show that Bach or Swibel, both of whom had testified before the Grand Jury, were unavailable. Instead, in rebuttal argument, the government explained its failure to call these declarants by attacking their reliability, thus enhancing the need for the jury to determine their credibility and the validity of the government's assertion that the declarants were, in fact, susceptible to petitioner's pressure. The jury could not make these determinations merely on the basis of the hearsay letter. (T. 3373, 3374)

As the evidence sought to be adduced by the government through the use of the document and the inferences to be drawn therefrom were crucial in proving the alleged "scheme", a burden was placed upon the government to produce the declarants or, at least, to account for their unavailability. As Judge Weinstein states:

> "If the evidence is crucial and has never been tested by cross-examination, the burden on the government of producing the declarant or accounting for his unavailability does not seem unduly large, particularly since a person's liberty is at stake. This is a situation par excellence where the right to confrontation should prevail."[8] (4 Weinstein's Evidence, 800-24).

[8] It has been stated that "The trial judge in a criminal case should admit hearsay statements only if the defendant is afforded an adequate substitute for confrontation." Jennings, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. of Pa. L. Rev. 741, 748 (1965). In this case, there has been no substitute. Petitioner has been denied access to the Grand Jury testimony and other statements, if any, of Bach and Swibel. We respectfully request the Court to examine this testimony *in camera* to determine whether the government's use of the "Broderick letter" comports with "the fundamental demands of due process of law in the fair administration of criminal justice." *United States* v. *Nixon*, 418 U.S. 683, 713 (1974).

Moreover, the use of the multiple hearsay document, in conjunction with the closing argument made therefrom, demonstrates, as the the commentators have heretofore indicated, that the confrontation clause should be employed to establish proper standards for prosecutorial behavior. McCormick, Evidence, §252 at p. 607 (2d Ed. 1972); Note, Confrontation and the Hearsay Rule, 75 Yale L. Jour. 1434 (1966):

> "The Confrontation Clause . . . should focus on the legitimate concern raised by a liberalized hearsay rule: that such a rule may institutionalize baseless prosecutions, or at least tempt prosecutors to use hearsay instead of live witnesses whose demeanor is unimpressive; or that it may induce prosecutorial negligence in securing witnesses by holding out the easy alternative of presenting their statements through other witnesses. Such practices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach.
>
> • • •
>
> "The objection to the prosecutor's presentation of hearsay instead of an available witness is not that such hearsay necessarily is less reliable than the hearsay of an unavailable witness, but that the prosecutor has made the testimony less reliable than it might have been." (75 Yale L. Jour., 1434, 1438, 1439).

Here, the prosecutor used the document and, in closing argument, made extensive references thereto and drew broad inferences therefrom. Because the testimonial-utterances in the document are untested, it cannot be determined whether the government's closing argument accords with the standards required by *Berger* v. *United States,*

295 U.S. 78, 88 (1934). Only the government has knowledge of the facts, and it has failed to reveal them.[9]

The issues raised by the admission and use of the document in this case concern the administration of criminal justice in the federal courts and the nature of criminal trials. They assume added dimensions in the light of the adoption of the Federal Rules of Evidence.

Respectfully, these issues justify the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW CONFLICTS WITH THE STANDARD OF REVIEW REQUIRED IN CRIMINAL CASES.

The inferences drawn from the multiple hearsay chain in the Broderick letter permeated and affected the entire trial. If it could be found that petitioner was so powerful as to unduly influence a man of Swibel's stature, the concededly weak evidence of "advance information" gains appeal. Here, the entire charge is based upon petitioner's position as an important local government figure and the fact that he allegedly suggested purchase in the 87th-Mackinaw development area even though (1) the evidence was undisputed and overwhelming that information concerning urban renewal there had previously been published in mass media, and (2) there was no evidence that petitioner had, in fact, obtained advance, confidential or inside information.

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[9] Because of the withholding of the Bach and Swibel testimony, it cannot be determined whether the government has failed to produce favorable evidence in violation of the mandate of *Brady* v. *Maryland,* 373 U.S. 83 (1963).

"Advance information," per se, is not unlawful or even improper. To use advance information improperly, the information must be "inside" or confidential.

The opinion below, however, creates an irrebuttable presumption that, if a public official has any information, it necessarily is either "inside" or "confidential." This is not the law. The creation of such a presumption insofar as it affects the quantum of evidence required for conviction merits review.

Without such a presumption, the evidence concerning advance information, taken most favorably to the government, is not merely "not overwhelming," Appendix, p. 18, *infra;* it is so insubstantial as to violate the standard required on review of criminal cases. Viewed in the light most favorable to the government, there must be substantial evidence of guilt to sustain a conviction. See *Glasser* v. *United States,* 315 U.S. 60, 80 (1942). However, this facet of the alleged scheme, the use of advance information, is "so totally devoid of evidentiary support as to render . . . [conviction] unconstitutional under the Due Process Clause . . ." See *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Thompson* v. *City of Louisville,* 362 U.S. 199, 204 (1960).

III.

THE PROSECUTION HERE INTRUDES ON AREAS OF PECULIARLY LOCAL CONCERN. APPROVAL WILL PERMIT GREATLY EXPANDED FEDERAL OVERSIGHT AND CONTROL OF LOCAL AFFAIRS.

This case concerns complex state regulatory schemes in areas traditionally the province of local administrators and state courts and not heretofore the subject of claims of

"fraud". Statutes and ordinances governing scavenger sales, special assessment procedures and local foreclosure practices have, for the first time and for the purpose of effecting this prosecution, been interrelated with other state statutes pertaining to conflict of interest and a city council rule of order. Interpretation of such laws and their interrelationships is properly a function of the state and is customarily left to its judiciary. The federal criminal claim against petitioner is clearly "entangled in a skein of state law. . . ." *McNeese* v. *Board of Education,* 373 U.S. 668, 674 (1963).

In addition, federal intervention of this sort inevitably and improperly creates standards for local legislators. Such standards, even on the federal level, are, at best, vaguely defined. "Once outside the boundaries of bribery and overt self-dealing, there is very little consensus . . . about what constitutes a legitimate or an illegitimate business or political transaction." See Beard and Horn, Congressional Ethics, The View from the House, 42-45 (Brookings, 1975).

Ordinarily, in civil cases, where complex state statutory schemes are involved, federal courts will abstain from making rulings. Such state law questions are left to be decided by state courts. *City of Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U.S. 168 (1942); *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975). This principle is equally important in the administration of criminal justice. As stated in *Hoag* v. *New Jersey,* 356 U.S. 464, 468 (1958):

> ". . . It has long been recognized as the very essence of our federalism that the states should have the widest latitude in the administration of their own system of criminal justice."

In this case no traditional crime or fraud supported the alleged "mail fraud." There was neither bribery, extor-

tion, income tax evasion, false pretenses or the use of false statements. The fraud, at best, depended on petitioner's alleged technical breach of vague, moral standards established by the courts below. Even then the courts varied. The district judge premised his standards on the state statutes and City Council Rules, and instructed the jury accordingly.[10] (T. 3416-22) The Court of Appeals paid lip service to the state statutes, but grounded its conclusion that there was fraud on an amorphous standard of moral conduct. Appendix, pp. 15-16, *infra*. Absent the mail fraud statute, however, a federal court would not consider the peculiarly local *in rem* procedures with which the various state and local governmental and judicial agencies were here involved. This prosecution, thus, encourages intrusion into delicate areas of a state's administration of purely local procedures and shifts massively the authority of the federal government to control local affairs.

It was not the purpose of the mail fraud act to provide a vehicle for this sort of federal oversight or intervention by federal prosecutors or courts, particularly in areas in which their knowledge and awareness is limited and where local custom and practice might place a gloss on literal interpretation of statutory language.

Intrusion into the local arena (and, especially, into local politics) has been a recurring issue in the administration of federal criminal justice. Such intrusion has been strongly condemned.

The late Justice Robert A. Jackson, as Attorney General of the United States, addressed a conference of federal prosecutors on the proper use of their power:

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[10] The trial court's instructions recited the statutes with no attempt at explanation.

"[A] . . . delicate task is to distinguish between the federal and the local law enforcement activities . . . we are concerned only with the prosecution of acts which the Congress has made federal offenses. . . .

"But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and/or morals. And the moral climate of the United States is as varied as its physical climate. . . . In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law . . . there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly." (Journal of the American Judicature Society, Vol. 24, No. 1, June, 1940, p. 20.)

See *United States* v. *Archer*, 486 F. 2d 670, 677-678 (2d Cir. 1973). See also Jackson, *The Supreme Court in the American System of Government*, 70, 71 (Harper Torchbooks, 1963); *Screws* v. *United States*, 325 U.S. 91, 160-161 (1944) (Frankfurter, J., dissenting); *Rutkin* v. *United States*, 343 U.S. 130, 141-146 esp. n. 5 at p. 144 (1951) (Black, J., dissenting); Friendly, Federal Jurisdiction: A General View, 58, 61 (1973).

The instant prosecution uses the mail fraud statute to alter significantly the federal-state balance. All of the acts of petitioner were intrastate. If a crime has been committed, state criminal statutes are available. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states. The mail fraud statute was enacted in accord with that principle. The legislative history of the Act does not demonstrate

any other purpose. See, e.g., *United States* v. *Bass*, 404 U.S. 336, 349-350 (1971). See also, *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). Thus, this case "dramatically intrudes" upon traditional state criminal jurisdiction.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS E. KEANE,

Defendant-Appellant.

No. 74-1979.

United States Court of Appeals, Seventh Circuit.
522 F.2d 534

Before SPRECHER and BAUER, Circuit Judges, and EAST,* Senior District Judge.

SPRECHER, Circuit Judge.

This appeal seeks review of the conviction of Thomas E. Keane, former Alderman of Chicago's Thirty-First Ward and Chairman of the City Council's Committee on Finance, for violation of 18 U.S.C. § 1341 (mail fraud) [1]

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* Senior District Judge William G. East of the District of Oregon is sitting by designation.

[1] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or

and 18 U.S.C. § 371 (conspiracy).[2]

I

On May 2, 1974, a 21-count indictment was returned against the defendant Keane. The indictment alleged a mail fraud scheme in violation of 18 U.S.C. § 1341 in which Keane would purchase through nominees, in some cases with advance information, tax delinquent properties at the Cook County scavenger sale in 1966; that these properties would be held in various land trusts without disclosure of the beneficiaries; that they would receive favorable treatment, in having certain encumbrances removed, by the City Council and its various committees and subcommittees, without disclosure of Keane's interest in the properties and with Keane voting on matters that favorably affected his interest; that Keane would vote to authorize the acquisition of parcels in areas in which there were properties in which he had an interest and that he used his position and influence to aid in the sale of the properties to various private and governmental interests.

(footnote continued)

takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2] 18 U.S.C. § 371 provides in relevant part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The indictment went on to allege that the outlined scheme defrauded the City of Chicago, its citizens and Keane's fellow aldermen of their right to the "conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties" by the defendant and their right to have the City's business and its affairs conducted "honestly, impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments, and in accordance with the laws of the State of Illinois and the City of Chicago. . . ."

The indictment also charges Keane with conspiring with John Hennessey, Sr. [hereinafter Hennessey] and John Hennessey, Jr. [hereinafter Junior], both unindicted co-conspirators, to violate the mail fraud statute in violation of 18 U.S.C. § 371.

A

Although the evidence is in places conflicting, the basic outline of the alleged scheme is sufficiently clear.[3] In early 1965, a list of tax delinquent properties to be sold at Cook County's scavenger sale scheduled for June 1966, pursuant to Ill. Rev. Stat. ch. 120, § 716a, was published. The purpose of this sale was to place property upon which taxes had not been paid for ten years back on the tax rolls by allowing the purchaser at the scavenger sale to obtain title clear of county tax liens by paying only current and the preceding two years' taxes.

In early April 1965, discussions commenced between Hennessey, Nathan Schwartz and the defendant concerning the formation of Alpine Investments to purchase proper-

[3] Part I is by no means a complete summary of all the facts. More detailed recitals of the evidence, where necessary, are reserved for later parts in considering defendant's arguments on this appeal.

ties at the 1966 scavenger sale for investment purposes.[4] In connection with this venture there was established Chicago Title and Trust land trust No. 53129, into which properties acquired by Alpine were to be placed and in which all three partners had equal one-third beneficial interests.

In preparation for the 1966 scavenger sale Alpine, the day-to-day operations of which were run by Hennessey, hired Junior, John Babbington and Vincent Schall to research the properties to be sold. Approximately a month prior to the sale, Keane, Hennessey and Junior met in Hennessey's office to discuss the properties on which to bid. The three of them went through some of the Sidwell map books of the City and Keane made pencil comments

[4] This was not the first time that Hennessey and Keane had become business partners. In 1947, two years after he had become an alderman, Keane entered into a business venture with Hennessey to purchase special assessment bonds.

Eventually this enterprise gave way to other business ventures between the two, including the formation in 1963 of THAK Investments to purchase special assessment bonds and vacant tax delinquent lots. THAK properties were placed in Illinois State Bank land trust No. 139 of which Keane and Hennessey were equal beneficiaries. According to Hennessey, he stopped purchasing properties for THAK in his own name at Keane's suggestion, because Keane was concerned that too many people knew that there were partners.

In addition, prior to the formation of THAK but with similar purpose, there was created Wabash Investments. The equal partners in this venture were Hennessey, Nathan Schwartz and Adeline Keane, the defendant's wife. The government claimed that Mrs. Keane took no active part in this venture and served merely as a front for her husband's investment. The defendants introduced evidence attempting to show that the funds invested in her name were her own. Properties acquired by Wabash were placed in Illinois State Bank land trust No. 149.

The bulk of the alleged scheme deals with Alpine lots, but in some instances Wabash and THAK lots were involved.

on the borders of the map such as "No," "check title, taxes, etc.," "If nobody else buys," "O.K.." "If cheap," "NG," "Page NG, but only for a song," and "Check Park." According to Hennessey's testimony Keane said that they should buy all the lots they could in the 87th and Mackinaw area because the government was going to construct a big project there.

Prior to the sale, the three partners, each of whom had invested approximately $100,000, arranged for a $300,000 loan at LaSalle National Bank to purchase scavenger sale properties, assuring the bank that it would be paid out of proceeds from the sale of lots acquired. When the loan was eventually called it was paid by a $275,000 loan from the Jefferson State Bank arranged by Keane.

The scavenger sale began on June 6, 1966, and lasted for about five weeks. Hennessey participated in the sale for the first week and then left responsibility for Alpine's bidding to Junior and Harry Rubenstein, an attorney for Alpine. Properties were bid for in the name of either John Hennessey, Sr. or Ada Sills, Rubenstein's wife's maiden name. Alpine was the second largest purchaser at the sale, purchasing 1,878 parcels of property at a total cost of $208,543.

B

In order to obtain clear title after the statutory two year period of redemption ran,[5] it was necessary for Alpine to remove the special assessment liens against each parcel. Special assessments are a means of financing local

[5] Alpine received a certificate of purchase for each parcel purchased, subject to the original owners right of redemption at any time up to two years from the date of the scavenger sale by paying the bid price plus statutory interest. Approximately 300 to 400 properties purchased by Alpine at the scavenger sale were redeemed.

improvements such as alleys, sewers, streets and other improvements which benefit the adjacent properties. Special assessment bonds are issued to the contractor evidencing his right to payment for the work performed. Bondholders [6] are paid from the special assessment fund established to receive the payments from the private property owners and used to pay the principal and interest on special assessment bonds. According to the testimony at the trial no City funds are contributed to this fund, but the fund does pay to the City's general corporate fund up to five percent of the original assessment, presumably to cover administration expenses.

Bondholders, although having no direct action against the City, in the event of default may recover on the bonds by an action against the property. In order to remove the lien of the special assessment bondholders on the parcels it purchased, it was necessary for the Alpine partners,[7] in the name of the land trust that held the property, to cause foreclosure proceedings to be instituted. In cases where there were outstanding bondholders this was accomplished by filing a "Request for Foreclosure of Special Assessment Liens." For properties in Chicago, this application is forwarded to the staff of the Subcommittee on Special Assessments, a subcommittee of the Committee on Finance of the City Council, so that the Subcommittee can set a minimum bid to be made by the applicant at the

[6] Generally the contractors discount these bonds to lenders or investors, thus receiving immediate payment for their work without waiting for the various installments to fall due.

[7] Properties owned by THAK and Wabash were also subject to liens of special assessment bondholders and with respect to the removal of such liens, and the charges in the indictment relating to such removal, are considered in the same light as Alpine properties.

subsequent foreclosure proceeding, commenced by the City of Chicago in the Circuit Court of Cook County. Although the judge could reject the minimum bid as inadequate or the bondholders could actually participate in the foreclosure sale thereby bidding the price up, in practice the minimum bid set by the Subcommittee invariably ended up as the purchase price. The money received from the sale is paid to the County Collector and transmitted through the special assessment fund to the bondholders.

At all times relevant to this case the chairman of the Subcommittee on Special Assessments was Alderman Fifielski, who was appointed to the position by Keane. There was testimony that Hennessey met Fifielksi in Keane's outer office at City Hall and said "Alderman, we have some special assessments we would like to have foreclosures on. Would you call a meeting?" Fifielski subsequently held a meeting on June 26, 1970.

The evidence clearly showed that prior to this meeting Fifielski had set minimum bids for foreclosures at 30 to 60 percent of the principal amount due on the special assessment bonds. At the June 26, 1970 meeting of the Subcommittee, almost all of the 32 parcels of property in which the defendant had an interest were assigned minimum bids of approximately 10 percent.

The other procedure followed by the Alpine investors to obtain title clear of special assessment liens was "Compromise Offers in Lieu of Foreclosures." In the early 1930's the special assessment fund had redeemed a substantial number of bonds. Thus, some of the parcels in which the defendant had an interest were subject to liens for which there were no bonds outstanding. In this situation a property owner in order to clear the lien is required to settle the claim of the special assessment fund by making payment to it. If the comptroller, to whom application is made, determines that there are no outstanding bond-

holders, a compromise offer based on a standard formula is transmitted to the Subcommittee on Special Assessments. The compromise figure was always equal to "sales and costs" which Alderman Fifielski testified was the amount that the special assessment fund paid when it originally redeemed the outstanding bonds.[8]

In both the case of "Requests for Foreclosures of Special Assessment Liens" and "Compromise Offers in Lieu of Foreclosures," the Subcommittee reports, with its recommendations, were inserted in the report of the Finance Committee, which at all times relevant to this case would be introduced to the full City Council by the defendant. After introduction of such reports, if there was no objection or debate desired, the matter would be referred to the omnibus bill and be voted on at the end of the day along with other matters.[9] On numerous occasions the defendant

[8] The government attempted to show that Alpine properties and other properties in which Keane had an interest received compromise offers that were lower than the total amounts due considering the original principal and accrued interest on the special assessment warrants originally issued. The defendants introduced evidence that showed that all properties were treated equally, and that it was the "sales and costs" figure that was significant in determining the compromise offers set. There does not appear to be a reasonable basis from the exhibits introduced upon which to conclude that properties in which Keane had an interest received any more favorable treatment than other properties that were handled through the "Compromise Offer in Lieu of Foreclosure" procedure.

[9] The omnibus bill usually contains fairly perfunctory matters and is generally passed by a unanimous vote. The procedures of the City Council provide that if any alderman objects to an item being voted upon in the omnibus, then debate and a roll call vote should be held. Additionally, any matter may be referred back to committee or be reconsidered at the next council meeting.

Keane voted in favor of omnibus bills containing "Requests for Foreclosures" and "Compromise Offers in Lieu of Foreclosure" proposals relating to properties in which he had an interest.[10] Keane never disclosed his interest in these properties to his fellow aldermen.

At trial the government called a number of aldermen, who testified that they would have voted against the proposals if they had known of Keane's interest or would have demanded further investigation and debate on the matter. The defense produced a number of aldermen who testified that they would have voted the same way, even if they had known of Keane's interest, assuming the properties in which he had an interest were accorded the same treatment as those in which he had no interest.

C

The final phase of the allegedly fraudulent scheme dealt with the disposition of Alpine and other properties owned by various land trusts, in which the defendant Keane had an equitable interest as beneficiary. The indictment alleged that Keane used undue influence and inside information in relation to the disposition of some of the properties.

The undue influence charge is based on transactions with three governmental agencies. In May 1968, Keane voted in the City Council to authorize the Chicago Housing Authority (C.H.A.) to acquire properties located in the En-

[10] In all, 121 Alpine, Wabash and THAK lots received City Council approval for foreclosure requests on 17 separate dates. Keane introduced and voted favorably upon such motions on all 17 dates. Likewise, 122 Alpine, Wabash and THAK lots received City Council approval for compromise offers in lieu of foreclosure on 24 separate dates. Keane introduced and voted favorably upon these motions on each occasion.

glewood, Woodlawn and Lawndale areas of Chicago, notwithstanding the fact that Alpine had an interest in properties in these areas. Hennessey testified that he was with Keane during the summer of 1968 when Keane called Charles Swibel, Chairman of the C.H.A. and said "Charlie, this is Tom Keane. John Hennessey and I own some lots. We would like to have you buy some of them." Hennessey, on Keane's instructions, went to see Swibel.[11] Keane denied ever requesting Swibel to purchase any lots. Eventually approximately 60 parcels were sold to C.H.A.

Five parcels in which Keane had an interest were sold to the Chicago Dwelling Association (C.D.A.). C.D.A. is a non-profit corporation for which the C.H.A. acts as a purchasing agent.

In the spring of 1968, Hennessey gave Gerald Broderick, a C.D.A. attorney, a long list of properties that he had available. Initially Hennessey was informed that the C.D.A. could not buy the lots because of improper zoning. On July 23, 1968, pursuant to instructions from Ira Bach, C.D.A. Executive Director, Broderick sent a letter to Robert Snow, the individual in charge of C.H.A. land acquisition, requesting C.H.A. to purchase some lots located on or near Watkins Avenue and stating that Bach had informed him (Broderick) that Swibel wanted the lots purchased "as swiftly as possible." This letter was written during the same summer that Keane had asked Swibel to purchase some of Alpine's lots. Broderick received a letter from Snow dated July 26, 1968, stating that the subject properties were not in an area designated by the City Council,[12] and that the zoning was not suitable for C.H.A.

[11] Hennessey testified that Swibel treated him in a curt manner.

[12] When the C.H.A. expended funds for acquisition of properties for C.D.A., it was subject to the restriction that it only purchase property in areas previously approved by the City Council.

needs and was not likely to be rezoned. Snow suggested C.D.A. use its own funds for acquiring the properties. After receiving this letter Broderick sent a memorandum to James Phillips, his immediate supervisor, restating the same problems raised in Snow's letter and also indicating that the "per unit land cost is over twice what we normally pay." Notwithstanding these problems, the five Watkins Avenue lots were acquired by C.D.A. in September 1968.

The final transaction in which the government alleges undue influence involved sales to the Metropolitan Sanitary District (M.S.D.). M.S.D. threatened condemnation of 102 lots in which the defendant had an interest and offered to purchase them for $150 per lot. Thereafter, a meeting was held with Robert Wiss, an attorney representing M.S.D., Harry Rubenstein, attorney for Alpine, Hennessey and Keane. During the meeting Wiss indicated that the top appraisal was $700 per lot. Ultimately the lots were purchased by M.S.D. for approximately $775 per lot.

The primary transaction on which the government predicates its use-of-inside-information charge (as opposed to the undue-influence sales) is the sale of three lots to the Chicago Department of Urban Renewal (D.U.R.) in the 87th and Mackinaw area. As previously stated Keane had told Hennessey to acquire as much property as possible in this area because a big government project was going up.

In August 1966, after the scavenger sale, the City made its first definitive public move by requesting $129,000 in federal funds under the Neighborhood Development Program[13] to undertake a study to determine whether the area would qualify as an urban renewal project. Previously, there had been a great deal of public discussion con-

[13] Under this program the federal government provides two-thirds and the City provides one-third of the funds.

cerning this area. In January 1967, the City Council with Keane voting in the affirmative, notwithstanding his interest in approximately 30 parcels in the area, designated the area "slum and blighted" and thereby authorized the D.U.R. to begin acquiring properties in the area. After a series of negotiations [14] the D.U.R. eventually acquired three lots in which the defendant had an interest.

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[14] The government introduced detailed evidence concerning these negotiations. According to the evidence certain large portions of the area were slated for early acquisition. Earl L. Neal, Special Assistant Corporation Counsel in late 1968, arranged for appraisals on parcels in these areas and began the preliminary steps for condemnation proceedings. Subsequent to this in January 1969, Keane inquired of Lewis Hill, Commissioner of D.U.R., allegedly for a friend and without disclosing his own interest in the properties, whether D.U.R. would allow improvement of lots by property owners in the project area. Hennessey testified that Keane told him to write and send a list of the properties that they owned in the area to Hill. Hennessey sent such a list indicating that he owned the properties. Hill recognized the properties as the ones which Keane had referred to in their previous discussions.

Upon receipt of their letter, Hill instructed Walter Sroka, director of land acquisition for D.U.R., to obtain appraisals in the properties listed, notwithstanding the fact that many of them were outside the areas marked for first acquisition, "because the owner has requested that we proceed to acquire as quickly as possible." The appraisals were ordered. Finally, on July 14, 1969, Neal sent three form letters to Hennessey offering to acquire three parcels in the primary acquisition area. These three lots were the only ones purchased, although at one point Hill indicated to Keane that five additional parcels might be purchased, but because of a lack of federal funds they were not.

At one point the government argues that Keane used his influence with Hill to get these lots purchased. This might be a reasonable conclusion from the evidence in the above paragraph, but seems slightly inconsistent in view of Keane's effort to keep his interest undisclosed from Hill. It is possible, however, that Keane was putting pressure on Hill to buy the properties, notwithstanding the fact that Keane did not want Hill to know who was the beneficiary of his efforts.

The other transaction which the government states represents the use of inside information is the sale of Alpine and THAK lots to the Chicago Park District. In February of 1970, Keane gave Hennessey a copy of a "Chicago Park District inter-office correspondence" which Keane said had been given to him by Alderman Fitzpatrick, chairman of the City Council Committee on Buildings and Zoning. The correspondence indicated that the Park District would condemn various properties owned by Alpine and THAK. Two years later, the lots specified in the inter-office correspondence were acquired by the Park District.

In addition to public agencies there were sales to private parties as well. National Homes Corporation eventually acquired 75 lots after extensive negotiations with Keane and other Alpine partners and employees. United States Steel acquired five lots in the 87th and Mackinaw area not wanted by D.U.R. for $12,500. Keane was referred to United States Steel by Lewis Hill and after contacting an old friend there, he was referred to the appropriate officers.

The government introduced evidence at trial that on the parcels sold to M.S.D., D.U.R., C.H.A., C.D.A., Chicago Park District and National Homes Corporation, there was a gross profit of $167,471.30.[15] On cross-examination it

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[15] For some reason this figure does not include the sales to United States Steel. The government figures showed the profits broken down as follows:

Purchaser	Profit On Sale	Parcels Sold
Metropolitan Sanitary District	$ 55,954.82	102
Department of Urban Renewal	7,658.17	3
Chicago Housing Authority	53,893.90	58
National Homes Corporation	32,170.85	45
Chicago Dwellings Association (THAK)	1,119.64	5
Chicago Park District (THAK and Alpine)	16,673.92	5
TOTALS	$167,471.30	218

was determined that this figure did not include expenses to Alpine and THAK such as taxes, overhead and sales commissions to Junior. The defendant introduced evidence that Keane had a net loss of $26,032.07 for all transactions involving THAK and Alpine properties.

Keane was found guilty by a jury of conspiracy and 17 counts of mail fraud. From this conviction the defendant appeals, citing four principal matters that he contends require reversal: (1) the evidence adduced at trial was insufficient as a matter of law to constitute a fraudulent scheme; (2) assuming the existence of a fraudulent scheme, the mailings were not in furtherance of that scheme; (3) the Illinois State statutes read to the jury were inapplicable to the facts of this case; and (4) the district judge made erroneous rulings on evidentiary and other trial matters.

II

The government alleged and introduced evidence of a fraudulent scheme involving the defendant with respect to three general areas. First, the government contends that it was improper for Keane to acquire properties at the 1966 scavenger sale, in some instances using inside information. Second, that it was improper for Keane to vote on matters in the City Council affecting land in which he had an interest without disclosing that interest, and in the case of "Requests for Foreclosures" to receive preferential treatment. And finally, it was improper that the defendant use the influence of his office for his own personal benefit in the disposition of properties in which he had an interest, and that he sell parcels that he had acquired through the aid of inside information.

The defendant, on the other hand, contends that there was no fraudulent scheme, that it was not improper for

Keane to acquire parcels at the 1966 scavenger sale, that his actions in the City Council were pro forma votes on matters in which the City of Chicago had no interest, and finally that there was inadequate proof with respect to the undue influence and the advance information charge.

In some respects we agree with the defendant's position insofar as he suggests that certain actions to which the government attempts to attribute criminality were either not by themselves criminal or not supported by sufficient evidence to draw the inferences the government wishes us to draw. This does not mean, however, that in viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), there was insufficient proof to establish an overall scheme violative of the mail fraud statute. It is not necessary for all aspects of an alleged scheme to be illegal in their separate parts, but rather only that the scheme viewed as a whole involve fraudulent conduct. *Holmes* v. *United States*, 134 F.2d 125 (8th Cir.), *cert. denied*, 319 U.S. 776, 63 S.Ct. 1434, 87 L.Ed. 1722 (1943); *United States* v. *Brandom*, 273 F.Supp. 253 (E.D. Wis. 1967).

The purpose of the mail fraud statute is to prevent the post office from being used to carry schemes to defraud into effect. *Parr* v. *United States*, 363 U.S. 370, 389, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). The two necessary elements for violation of the mail fraud statute are formation of a scheme with intent to defraud and the use of mails in furtherance of that scheme. *United States* v. *Shavin*, 287 F.2d 647, 649-50 (7th Cir. 1961). The statute includes a broad proscription of behavior for the purpose of protecting society. *United States* v. *Owen*, 231 F.2d 831 (7th Cir.), *cert. denied*, 352 U.S. 843, 77 S.Ct. 42, 1 L.Ed. 2d 59 (1956). A specific violation of state law, although

covered by the statute, *United States* v. *Flaxman*, 495 F.2d 344, 349 (7th Cir.), *cert. denied*, 419 U.S. 1031, 95 S.Ct. 512, 42 L.Ed.2d 306 (1974), is not necessary to obtain a conviction for mail fraud. *United States* v. *States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 and 950, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974); *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), *cert. denied*, 409 U.S. 891, 93 S.Ct. 118, 34 L.Ed.2d 148 (1972). Rather the "[l]aw puts its imprimatur on . . . accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Blachly* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967). Neither the ultimate success of the fraud nor the actual defrauding of a victim is crucial to a successful prosecution. *United States* v. *Reicin*, 497 F.2d 563, 571 (7th Cir.), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974); *United States* v. *George*, 477 F.2d 508, 512 (7th Cir.), *cert. denied*, 414 U.S. 827, 94 S.Ct. 49, 38 L.Ed.2d 61 (1973); *Shavin*, *supra* at 651-52.

With these basic principles in mind we turn separately to each of the three fundamental aspects of the scheme.

A

With respect to the acquisition of properties at the county scavenger sale, we believe that it was clearly improper and therefore actionable under the mail fraud statute for the defendant to make use of inside advance information obtained by virtue of his official position for his own personal gain. *See, e. g., United States* v. *Peltz*, 433 F.2d 48, 52 (2d Cir. 1970), *cert. denied*, 401 U.S. 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971); *United States* v. *Groves*, 122 F.2d 87, 90 (2d Cir.), *cert. denied*, 314 U.S. 670, 62 S.Ct. 135, 86 L.Ed. 536 (1941); *United States* v. *Buckner*, 108 F.2d 921, 926 (2d Cir.), *cert. denied*, 309 U.S. 669, 60 S.Ct. 613, 84 L.Ed. 1016 (1940).

In *United States* v. *Buckner* where the defendants were in a fiduciary position with a group of bondholders, the court said: "[u]sing a fiduciary position . . . to obtain secret profits based upon inside information is not only a breach of trust, but an active fraud on the bondholders." *Buckner, supra* at 926. Similarly, in *United States* v. *Groves* the court said in reference to corporate officers that "there was certainly the use by a fiduciary of inside information to his own benefit and to the detriment of his cestui, which, when involving use of the mails, we have recently held to be within contemplation of the mail fraud statute." *Groves, supra* at 90. Finally in *United States* v. *Peltz*, where a conspiracy to defraud was involved and the defendant was charged with receiving advance inside information from an employee of the S.E.C., the court said: "[p]ublic confidence essential to the effective functioning of government would be seriously impaired by any arrangement that would enable a few individuals to profit from advance knowledge of governmental action." *Peltz, supra* at 52.

These cases taken together show that advance dissemination and use of governmental information by a few individuals impairs the functioning of government and that when the use is made by a public official it amounts to a breach of a fiduciary duty which is clearly actionable under the mail fraud statute. *Post* v. *United States*, 132 U.S. App. D.C. 189, 407 F.2d 319, 329 (1968), *cert. denied*, 393 U.S. 1092, 89 S.Ct. 863, 21 L.Ed.2d 784 (1969); *United States* v. *Dorfman*, 335 F.Supp. 675, 679 (S.D.N.Y. 1971), *aff'd*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923, 93 S.Ct. 1561, 36 L.Ed.2d 317 (1973); *United States* v. *Hoffa*, 205 F.Supp. 710, 716 (S.D. Fla.), *cert. denied*, 371 U.S. 892, 83 S.Ct. 188, 9 L.Ed.2d 125 (1962).

With respect to the acquisition of a significant number of parcels in the 87th and Mackinaw area, the evidence in its form most favorable to the government showed that while discussing what properties to acquire at the scavenger sale, Keane told Hennessey to buy in this area because a "big government project" was going up. Subsequently, 30 parcels in this area were purchased.

Although the defense introduced evidence to show that discussions concerning urban renewal in this area had been going on for a decade, the government introduced evidence that it was not until August 21, 1966 (after the scavenger sale), that an announcement was made to the public that the area had definitely been designated to undergo study to see if it qualified for urban renewal. Thereafter, the area was designated by the City Council, with Keane voting in the affirmative, as "slum and blighted" and the D.U.R. began acquiring land in the area including three lots in which the defendant had an interest.

Although the evidence is not overwhelming on the use of advance information charge, and it is possible to interpret the evidence as representing shrewd business judgment on Keane's part, we cannot say that the jury was not entitled to believe that Keane made use of advance information to acquire substantial amounts of property in an area prior to the public announcement indicating that the area was being considered for urban renewal. This use of advance information by a public official as we have said violates the mail fraud statute.

B

The next aspect of the charged fraudulent scheme involved Keane's participation in official City Council proceedings, without disclosure, on matters in which he had a financial interest. It is clear to us that one who breaches

the public trust by actively concealing a personal financial interest from the public and from a public body charged with the responsibility of passing judgment on matters directly affecting that financial interest, and on which he serves and in which he participates in the formulation of the collective judgment of that body, pursuant to his official duties, may be prosecuted for mail fraud. *Cf. United States* v. *Barrett,* 505 F.2d 1091 (7th Cir. 1974), *cert. denied,* ..... U.S. ....., 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975); *United States* v. *Isaacs,* 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).

As this court said in *United States* v. *Isaacs,* where a former Illinois governor was prosecuted for accepting bribes given in an effort to obtain more favorable racing dates "[t]he citizens of Illinois were defrauded of Kerner's honest and faithful service as governor," notwithstanding the fact that no actual pecuniary loss to the State of Illinois was shown. *Isaacs, supra* at 1150. Similarly, in *United States* v. *Barrett,* where the Cook County Clerk was found guilty of accepting money from a voting machine manufacturer for purchasing the City's voting machines from the company, and where the insurance on those machines was placed through an agency that received 25 percent of the premiums paid by Cook County to the insurance carrier and passed on 15 percent of that amount to the defendant, the court quoted approvingly the language of the *Isaacs* decision finding a scheme that defrauds the public out of the honest and faithful services of a public official cognizable under the mail fraud statute. *Barrett, supra* at 1104.[16] Finally, in *Shushan* v. *United States,* 117

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[16] *See also United States* v. *Faser,* 303 F.Supp. 380 (E.D.La. 1969), where the court said "[t]hat it is a violation of the statute in question [mail fraud] if a person defrauds the State out of the 'loyal and faithful services of an employee.'" *Id.* at 384.

F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574, 61 S.Ct. 1085, 85 L.Ed. 1531 (1941), an indictment was sustained that alleged that a member of a public board used his influence to obtain approval for refunding bonds for a percentage of the profit without disclosing this interest, and that by reason of the secret interest of the board member the "Board was . . . deprived of [the] fair judgment of one of its members, who assiduously and corruptly influenced and persuaded the other members. . . ." *Id.* at 115.[17]

With respect to "Requests for foreclosures of Special Assessment Liens," as we stated in Part I B *supra*, prior to the June 26, 1970 subcommittee meeting, Alderman Fifielski had set minimum bids at 30 to 60 percent of the principal due on the outstanding special assessment bonds. At that meeting when 32 parcels of property in which the defendant had an interest were acted on, Fifielski set minimum bids of 10 percent.

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[17] Much of the language in *Shushan* is applicable to the facts of this case.

> [Defendant] had been a *member of the Board* for seven years, and was *Chairman of the Finance Committee*, apparently without other members on it. *He was a lawyer, and his advice and opinion had weight with the Board.* In the adoption of this contract, and in the several refundings under it, according to the stenographic reports of the meetings, he did most of the questioning and arguing with Newman and Harris, *made most if not all of the motions to accede to their proposals, and voted for them. The votes were always unanimous. No other member of the Board knew or suspected his interest in the matter.* He says he concealed it lest it might influence them to be more favorable. *We think the jury could well conclude that in his position his conduct was so irreconcilable with public duty and private morality that neither he nor anyone privy to it could intend fairness and honesty.*

Shushan, supra at 120 (emphasis added).

The defendants attempted to show through the testimony of Fifielski and the introduction of exhibits that subsequent to the June 26 meeting, low bids around 10 percent would be set if the application presented to the subcommittee did not have a proposed minimum bid, and that if it did, the amount of the proposed minimum, assuming it was greater than 10 percent, would be set. The evidence clearly showed, however, that this purported pattern was not followed consistently after the June 26 meeting. Defendant's own exhibit showed that four parcels considered at the October 13, 1970 meeting of the Subcommittee had minimum bids of 59.6 percent notwithstanding the fact that no proposed minimum was included by the applicant.[18] Also inconsistent with the defendant's meeting of January 21, 1971, for which the defense did not prepare a summary, although it prepared summaries for earlier and later meetings. Government counsel pointed to a number of parcels handled on that date for which no proposed bids were submitted by the applicant, but for which percentages were set well above 10 percent.[19]

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[18] Alderman Fifielski testified that these exceptions to the purported post-June 26 rule may have been caused by his accepting the recommendations of the Subcommittee's staff, rather than calculating 10 percent of the principal amount due. He said he may have done this because he may have been in a hurry.

[19] The defendant points out that when Harry Rubenstein took over the preparation of Alpine's applications for foreclosures he did insert bids on the applications and while some other properties without such bids in which the defendant had no interest were getting 10 percent treatment, the Alpine properties were receiving substantially higher percentages. The fact that not all properties of Alpine received the favored 10 percent treatment, of course, does not mean that on June 26, 1970 they were not receiving favored treatment.

Even if it were true that Alderman Fifielski, starting with the June 26, 1970 meeting, changed his policy with respect to minimum bids, it is quite clear that as of that date properties in which Keane had an interest received a lower percentage than applications submitted by others up to that time. Whether such a new policy was justified, perhaps under normal circumstances would be left to the judgment of the chairmen of the Special Assessment Subcommittee and the Finance Committee. This, however, should not have been the case when the new policy was to begin on a day when properties in which the chariman of the Finance Committee had an interest were to be considered. As of that date numerous aldermen testified that they would have considered in more detail the foreclosure requests which they approved had they known of Keane's interest. In any event there was sufficient testimony to show that the 10 percent policy was not consistently applied after the June 26 meeting, and from which the jury could believe that Keane introduced and voted on proposals granting properties in which he had an interest special treatment.

With respect to "Compromise Offers in Lieu of Foreclosures," the evidence was weak that properties in which the defendant had an interest received more favorable treatment than property belonging to other members of the public.[20] Regardless of this fact it still remains true that the defendant as Finance Committee Chairman introduced proposals with respect to properties in which he had an interest and thereafter voted on them without disclosing his interest. Keane owed a duty to the other aldermen to disclose his interest so that they could consider the

[20] *See* note 8, *supra*.

propriety of compromising a lien of the City's special assessment fund in favor of a City alderman. The fact that his properties may have received treatment which was the same as all other members of the public, and that he would have in all probability received this compromise offer even if he had disclosed his interest, does not change the fact that he did receive a benefit from the City Council's action without ever informing his colleagues of his interest.

The defendant contends that with respect to "Compromise Offers in Lieu of Foreclosures" the most the government has shown was a failure to disclose a personal pecuniary interest in matters presented before the City Council, and that this amounts to no more than constructive fraud, which is not actionable under the mail fraud statute. *Epstein* v. *United States,* 174 F.2d 754 (6th Cir. 1949).[21] In *Epstein* the defendants, who were officers of brewing corporations, were charged with buying supplies from another company in which they had a financial interest at excessive prices. The court first held that there was insufficient proof that an excessive price was charged and that there was a fatal variance between the indictment and the subsequently adopted government theory that defendant's failure to disclose their interest in the supply companies to their respective boards of directors

[21] Defendant's constructive fraud argument based on *Epstein* is clearly inapplicable to those properties which were subject to the "Request for Foreclosure" proceedings. As we have said with respect to that procedure there can be no question that defendant's properties were treated preferentially, and thus, Keane who was in a fiduciary position was voting to approve minimum bids applicable to his properties, while at the same time the City Council did not see fit to grant similar percentages to properties belonging to other members of the public.

was sufficient to constitute the fraud. *Id.* at 763. The court also stated that the receipt of money from another corporation by a director "without disclosure of interest to the board of directors does not constitute the perpetration of an active, intentional fraud upon his corporation where there is good faith, fair dealing, and benefit to the corporation, of which he is a director." *Id.* at 765.[22]

We do not believe that *Epstein* necessarily requires a holding that properties treated by the "Compromise Offer in Lieu of Foreclosure" procedure were not the subject of a fraudulent scheme. We note first that this court has recently distinguished the *Epstein* case. In *United States* v. *George,* 477 F.2d 508 (7th Cir.), *cert. denied,* 414 U.S. 827, 94 S.Ct. 49, 38 L.Ed.2d 61 (1973), the rationale of *Epstein* was not applied to a situation where the defendant, a buyer for Zenith did not disclose to that company that he was receiving a kickback from companies from which he purchased supplies for Zenith. The court after noting

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[22] Notwithstanding the fact that the court made a finding of fatal variance between the indictment and the evidence and that it indicated there was only minimal evidence of the defendant's interest in the supply companies, *Epstein, supra* at 769, the case is still cited for the proposition that a mere failure to disclose is insufficient to be cognizable under the mail fraud statute.

In addition to the statement quoted in the text the court after restating that the transactions involved were fair to the defendants' corporations stated:

> Certainly, a mere disclosure of interest could not convert an actual fraud with a wrongful purpose to injure or deceive, into an honest, moral transaction with a purpose to benefit. It is this consideration that serves as a criterion for distinguishing cases cited by the government to sustain its contention that lack of disclosure of interest—or secret profits, as the government terms it—proves actual fraud in this case.

Id. at 768.

that the *George* defendant, unlike the *Epstein* defendant, was required to turn over his secret profit to the employer he defrauded, went on to state that non-disclosure in *George* was essential to the fraudulent scheme.[23] While the comparison between *George,* and *Epstein* and the present case is difficult, because of the factual distinctions with respect to profit, we believe that the cases are not inconsistent with our conclusion that Keane's conduct with respect to "Compromise Offers in Lieu of Foreclosures" was violative of the mail fraud statute.[24]

This case, unlike *Epstein,* involves a public official. In recent years the mail fraud statute in this circuit has been used increasingly with approval to prosecute public officials for violating their constituents of their right to loyal, faithful and honest public service. *Barrett, supra; United States* v. *Staszcuk,* 502 F.2d 875 (7th Cir. 1974), *rev'd in part on rehr'ing,* 517 F.2d 53 (7th Cir. 1975), *petition for cert. filed,* 43 U.S.L.W. 3675 (U.S. June 24, 1975); *Issacs, supra.* In the factual circumstances of this case Keane's failure to disclose to his fellow aldermen his interest in

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[23] The court in *George* said:

> There was no reason to believe disclosure by the defendants in *Epstein* would have, under the particular circumstances there, made any bargaining difference to the breweries, but Yonan's [*George* defendant] disclosure, in addition to making the scheme impossible, would have enabled Zenith to realize a substantial discount.

George, supra at 513 n. 5.

[24] For other cases where the failure to disclose has been considered actionable under the mail fraud statute see generally *United States* v. *Simon,* 425 F.2d 796, 806-08 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970); *United States* v. *Miller,* 210 F.Supp. 716 (S.D. Tex. 1962).

matters pending before the City Council coupled with his other actions amounted to "conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' " *Blachly, supra* at 671. In addition this case involves more than "mere" non-disclosure. The evidence showed that Keane and his co-conspirators actively attempted to conceal the defendant's interest by the use of nominees when purchasing property, and by the use of land trusts to hold the acquired parcels.[25] It is also obvious that disclosure of Keane's interest in properties subject to "Compromise Offer in Lieu of Foreclosure" procedures could have well led to discovery of Keane's interest in properties subject to "Request for Foreclosure" procedures, which were clearly getting favored treatment. The defendant's failure to disclose his interest affirmatively misled his fellow aldermen and the alleged scheme was of such a nature that it "depended for [its] success upon concealment and deception and could not conceivably [have] be[en] carried out by the guilty [party] without covering up the true facts." *Epstein, supra* at 767.

Finally, defendant contends that the City's involvement in both procedures for clearing special assessment liens is minimal. He argues that in cases of "Requests for Foreclosures" only a minimum bid was set by the City Council, that this had to be subsequently approved by a court, and that the bondholders although receiving their payments from the special assessment fund, had no claim

[25] The use of nominees and land trusts are not in and of themselves illegal but must be viewed within the total factual context involved. *Holmes* v. *United States*, 134 F.2d 125 (8th Cir.), *cert. denied*, 319 U.S. 776, 63 S.Ct. 1434, 87 L.Ed. 1722 (1943).

against the City for any unpaid amount on the bonds. In effect what the defendant asks us to hold is that the City Council's action in approving "Requests for Foreclosures" had no effect and served no purpose—that the action by the Council was entirely superfluous. We refuse to so hold.

While it may be true that with respect to sophisticated bondholders who generally made private deals with owners who were seeking foreclosure so that the amount of the minimum bid set by the Council made no difference,[26] there are situations in which unsophisticated, nonprofession individuals hold the special assessment bonds.[27] These individuals especially, as well as professional bondholders, had the right to rely on the City Council to perform its function of setting a fair bid, one that reflected the fact that these bonds were not worth full value because of the long time they had been in default, but one that

[26] Generally what occurs is that once the minimum is set the bondholder meets with the property owner and through negotiations agree on an amount in addition to the bondholder's share of the minimum bid. The bondholder accepts the settlement figure in exchange for not bidding at the foreclosure sale. At what dollar level the negotiations begin depends on the minimum bid, but otherwise that amount is irrelevant.

[27] The defendant contends that there was no proof that any bondholder did not settle, and the government argues that there was no showing that all bondholders did settle. We consider this point irrelevant. Whether individuals sought to reach private settlements or not does not change the fact that the City Council had devised a plan which seemingly offered some protection to members of the public. The defendant Keane through his actions sought to subvert that plan. If all bondholders did indeed settle, his scheme did not meet with success, but success of a fraudulent scheme is not required by the cases for a mail fraud conviction. *United States* v. *Shavin*, 287 F.2d 647, 651-52 (7th Cir. 1961).

reflected the fact that they were still of some value. In this regard the City Council was to act as an arbiter by setting a minimally fair price,[28] a proposition that with respect to properties in which Keane had an interest, was not always true.

With respect to "Compromise Offers in Lieu of Foreclosures" we disagree with the defendant's contention that the City Council's action amounted to a nullity and that the City had no interest in these matters. "Compromise Offers in Lieu of Foreclosures" came about because the City, through the special assessment fund, during the depression, retired special assessment bonds. The defendant would have us believe that it made no difference whether the Fund ever received back any of the monies expended. This contention is belied by the fact that there existed a procedure to effect compromise offers for repayment to the Fund. While it is not clear how these funds are or will be used in the future, we cannot say that the City has no interest in using them again as it did in the depression or in some other manner.

We therefore reject the defendant's claim, made with respect to both "Compromise Offers in Lieu of Foreclosures" and "Requests for Foreclosures," that these were pro forma matters in which the City had no interest and the voting on which, even without the disclosure of defendant's interest, did not constitute fraudulent conduct. The fact that normally these were perfunctory matters left to the Subcommittee on Special Assessments and the Committee on Finance to handle because of their ex-

[28] The defendant argues that these minimum bids were subject to court approval. It is undisputed, however, that except in very few cases, the amount ultimately set by the court was the minimum bid approved by the Council.

pertise and were routinely approved, is all the more reason why Keane should have disclosed his interest. Involved in this case were not votes on major policy issues, where even if disclosure of a personal interest was not made, there still would have been serious consideration given to the merits of a proposal by public officials. Instead we have a situation where other aldermen relied on the expertise and presumably the objectivity of Keane's committee and the Special Assessment Subcommittee. Had they known that this objectivity did not exist, they would, as some testified, have requested further information and study regarding the proposals. It was this right to the defendant's faithful service and the right to be apprised of material circumstances with regard to the special assessment foreclosures and compromises upon which they voted, that Keane's colleagues, and through them the public, were defrauded.

C

The final part of the alleged scheme was the disposition of the properties. In relation to this aspect of the scheme the government charged the use of advance information, which we considered in Part II A, *supra,* and the use of undue influence by the defendant. With respect to the use of undue influence the government offered evidence detailing the sale of properties to the C.H.A. and C.D.A. through Charles Swibel and the sale to M.S.D. *See* Part I C, *supra.*

We have no doubts that use by a public official of his position and influence to obtain personal benefits can, under appropriate circumstances, constitute a fraudulent scheme in violation of the mail fraud statute. *Bradford* v. *United States,* 129 F.2d 274 (5th Cir.), *cert. denied,* 317 U.S. 683, 63 S.Ct. 205, 87 L.Ed. 547 (1942). Such conduct falls within the type condemned by *United States* v. *Blachly, supra* at 671. We have reviewed carefully the record in

this case and we believe that with respect to the sale and attempted sale of certain properties to C.D.A., the evidence was sufficient for the jury to believe that Keane used undue influence.

The evidence consisted of Hennessey's testimony that Keane called Swibel and asked him to purchase some of their properties. Despite Swibel's apparent anger at the request, properties were eventually acquired by C.D.A. pursuant to Swibel's desire. These and other properties were acquired or considered for acquisition, according to the evidence, despite the fact they were improperly zoned, were unlikely to be rezoned, were outside a City Council designated area and were significantly more costly than similar properties acquired by C.D.A. From the evidence the jury could reasonably assume that Keane had put pressure on Swibel, and that his conduct was part of a scheme that was violative of the mail fraud statute.[29]

III

The next major argument made by the defendant is that the mailings that are the basis of each count were not in furtherance of the alleged fraudulent scheme.[30]

Although it is not necessary that a scheme contemplates the use of the mails as an essential element, *Pereira* v. *United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954), it is necessary that the alleged mailing be "for the purpose of executing the scheme, as the statute requires." *Kann* v. *United States,* 323 U.S. 88, 94, 65 S.Ct.

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[29] With respect to the sale of lots to M.S.D., we believe that standing alone the evidence was insufficient to justify the conclusion that undue influence was used by Keane.

[30] At trial the government on its own motion dismissed Counts V, IX and XVIII.

148, 151, 89 L.Ed. 88 (1944). Each mailing that forms a basis for a count must be in furtherance of executing the fraudulent scheme. *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *Staszcuk, supra* at 880; *Isaacs, supra* at 1151-52. In addition, it is not necessary to establish a violation of the mail fraud statute that the defendant actually mailed anything himself, but it is sufficient if he caused it to be mailed, or does an act with knowledge that the use of the mails will follow in the ordinary course of business or that it can reasonably be foreseen. *Pereira, supra* at 8-9.

We note at the outset of this section that the government alleged and offered evidence that there was one overall scheme to obtain property, clear special assessment liens and dispose of properties. Criminality, with respect to any phase, as discussed in Part II, *supra,* is sufficient assuming that the count mailing in question dealt with a general aspect of the whole scheme or with properties which were the subject of some fradulent part of the scheme.

A

The first of three groups of mailings deals with the receipt of proceeds from the fraudulent scheme. Since the scheme would have no value without the sale of the properties, all the mailings relating to the negotiations and the ultimate sale of properties either acquired by virtue of inside information, subject to City Council action in which the defendant participated to clear special assessment liens or disposed of through the use of undue influence, are proper counts. A mailing in furtherance of the collection of proceeds from a fraudulent scheme is sufficient under the mail fraud statute. *Pereira, supra* at 8; *United States* v. *Britton,* 500 F.2d 1257, 1259 (8th Cir. 1974).

The Counts VI and XIX letters dealt with a problem in the proposed sale of properties, some of which had been the subject of City Council action, to National Homes Corporation Resolution of this problem was essential to the eventua sale.

The Counts VIII, XIV, XV and XX mailings all dealt with the offer and acceptance of real estate contracts between the Alpine partners and United States Steel. The properties that United States Steel purchased, although apparently not subject to City Council action to remove special assessment liens, were among the group that was purchased by the Alpine partners pursuant to advance information about the 87th and Mackinaw development project. [31]

Count II involved a letter from the City offering to purchase from the Alpine partners a lot obtained because of advance information about the 87th and Mackinaw development project. [32]

Count IV involved a sale of parcel, which had been subject to City Council action, to C.H.A. The letter referred to matters necessary to complete the sales transaction.

Count XII involved a letter dealing with the acquisition of property, not subject to City Council action, by C.D.A. From all the evidence the jury could believe that the C.D.A.'s acquisition of this parcel was attributable to Keane's use of undue influence on Swibel.

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[31] The fact that these properties were disposed of by the defendant and his partners to a party not anticipated by the advance information is insignificant. The fraudulent scheme was acquiring the properties with inside information, the actual disposition of the properties to any purchaser, completed the scheme.

[32] We deem it insignificant that the City made the initial offer.

Only the Count I mailing in this group is insufficient to sustain a conviction. That letter was merely an acknowledgement of payment from Hennessey to Leon Mayer, a purchaser of Alpine lots. The acknowledgement served no purpose in the fraud and was not connected with the collection of proceeds from the fraud. [33] *See, e.g., United States* v. *Isaacs,* 364 F.Supp. 895, 903 (N.D. Ill. 1973), *aff'd,* 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974). Accordingly, the conviction on Count I is reversed.

B

The second major area into which the account mailings have been classified are those relating to financing the scheme. The Count III mailing is a letter from Hennessey, which accompanied a check for $35,000 to the Jefferson State Bank in partial payment due on the loan of the Alpine partners. The beneficial interest of Alpine's land trust No. 53129 was assigned to the Jefferson State Bank as collateral. Thus, repayment of the money borrowed to purchase the parcels [34] was necessary to prevent the fruits of Alpine's venture from being lost to the Jefferson State Bank. Continuation of ownership so that the parcels could be disposed of for a profit, was essential to the overall scheme.

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[33] The second paragraph of this letter stated that the second payment, which was due in ninety days, was without interest. This letter did not purport to be a second billing or even attempt to negotiate the payment procedures. The reference appears to be no more than a casual reminder to Mayer that his next payment was without interest—something that was not particularly beneficial to the Alpine partners and which was at most merely incidental to the scheme.

[34] In actuality the Jefferson State Bank loan was used to pay off another bank loan, the proceeds of which had been used in the actual purchase at the 1966 scavenger sale.

The mailings of Counts XI and XIII, however, stand on a different footing. Both letters involve mailings by Bernard Feinberg, President of the Jefferson State Bank to Hennessey acknowledging payments on the loan. The government's argument that keeping the loans current worked to the benefit of the conspirators may well be true, but it still does not make the acknowledgments received from the bank an integral part of or in furtherance of the scheme. *United States* v. *Isaacs,* 364 F.Supp. at 903. The convictions on Counts XI and XIII are reversed.

C

The final area in which the count mailings have been classified are those in furtherance of concealment of the fraudulent scheme. *See e.g., United States* v. *Joyce,* 499 F.2d 9, 18 (7th Cir.), *cert. denied,* 419 U.S. 1031, 95 S.Ct. 512, 42 L.Ed.2d 306 (1974).

The Count VII mailing was a letter from a trust officer at Chicago Title and Trust to Nathan Slutzky granting permission to the latter to file an appearance in foreclosure of special assessment cases involving Chicago Title and Trust land trust No. 53129 in which Alpine properties were held. While it is probably true, as the defendant argues that it did not make much difference who represented the Alpine interest at the various Subcommittee meetings, obtaining an attorney for such representation was undoubtedly necessary and also allowed Keane, although a lawyer, to avoid representing the Alpine partnership himself, thus keeping his interest secret. [35]

The Count X mailing is an invoice from the trust department of the Illinois State Bank seeking compensation for

[35] We reject defendant's contention that since Keane did not know that Hennessey had engaged Slutzky that he was not responsible for the mailing. Keane and Hennessey were in the project jointly and the fact that Keane delegated day-to-day responsibility for Alpine's affairs to Hennessey does not relieve him of responsibility.

services rendered in relation to Land Trust No. 149. This land trust held properties that were accorded favorable treatment at the June 26, 1970 meeting of the Subcommittee on Special Assessments. Payment of trust fees, as requested by the invoice, played a direct role in keeping Keane's interest undisclosed. [36]

Counts XVI and XVII involved letters from the trust department of the Illinois State Bank in response to Hennessey's request for an accounting of what properties remained in Land Trust No. 149 [37] and 139. At various times both trusts contained properties which had been accorded preferential treatment by the City Council. A reply in response to a letter seeking information as to whether any of these properties remained, so presumably they could be sold, is in furtherance of the scheme.

IV

The defendant next challenges the use by the government of certain Illinois statutes and a rule of the City Council, and the reading of them to the jury, all of which defendant argues either do not apply to him or were not violated by his actions. Having previously concluded that even without reference to the challenged material that the scheme in which Keane was involved was violative of the mail fraud statute, in this section it is only necessary to

[36] It is conceded that land trust No. 149 held only properties owned by Wabash Investments in which Keane's wife was a partner. The evidence was conflicting as to whether Mrs. Keane was a bona fide investor or whether she represented only investment interests of her husband. The jury was certainly entitled to believe the latter alternative, given the testimony concerning Keane's control over Wabash Investments and the fact that Wabash properties were submitted to Fifielski's Subcommittee on June 26, 1970, along with THAK and Alpine properties.

[37] *See* note 35, *supra.*

consider whether the statutes and City Council rule were totally inapplicable to this case and so prejudicial so as to require a reversal. [38]

[38] Since the crux of this case does not depend on the violation of specific Illinois statutes, we find no merit in defendant's contention that the court below should have abstained from trying this case, because of the complex state regulatory scheme involved or the pending state civil action against the defendant.

The state court civil proceeding against the defendant was dismissed on the grounds that the plaintiff lacked standing because "not one cent of the City's money is expended" and because "no public trust [is] involved in the case at bar." *City of Chicago ex rel. Cohen* v. *Keane*, No. 74 CH 2825 (Cir. Ct. of Cook County, Sept. 20, 1974) (order).

We note first that the thrust of Judge Cohen's decision was that there could be no standing where there had been no loss of City funds. The court made no definitive ruling on the applicability of the challenged statutes to the facts of this case. The fact that under Illinois law a loss to the city must be shown before standing is granted to a plaintiff, *Golden* v. *City of Flora*, 408 Ill. 129, 96 N.E.2d 506 (1951), stands in sharp contrast with actions for mail fraud for which no loss to the victim needs be shown. *United States* v. *Reicin*, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974).

Even if the state court had determined that the statutes were inapplicable, although persuasive, we would not be bound by that decision inasmuch as conviction for mail fraud is not dependent upon a violation of state law. *United States* v. *States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 and 950 (1974); *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), *cert. denied*, 409 U.S. 891, 93 S.Ct. 118, 34 L.Ed.2d 148 (1972). Finally, it is also clear that an acquittal or assurances from state officials to the defendant that what he did was proper is not sufficient to stay a federal prosecution for mail fraud. *See generally United States* v. *Hutul*, 416 F.2d 607, 626 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007, 1012 and 1024, 90 S.Ct. 562, 573, 599, 24 L.Ed.2d 499, 504, 517 (1970); *United States* v. *Sylvanus*, 192 F.2d 96, 106 (7th Cir. 1951), *cert. denied*, 342 U.S. 943, 72 S.Ct. 555, 96 L.Ed. 701 (1952); *United States* v. *Anzelmo*, 319 F.Supp. 1106, 1117 (E.D. La. 1970).

The district judge prefaced his reading of the Illinois statues and the City Council rule with the following:

> In deciding whether the defendant defrauded the City of Chicago and its citizens and Keane's fellow aldermen of their right to the loyal and faithful services of the defendant Keane and of their right to have the City's business and its affairs conducted honestly and free from conflict of interest in accordance with the laws of the State of Illinois and the City of Chicago, you may consider the Illinois statutes and Rule 14 of the Rules of Order of the City Council of the City of Chicago that I am going to bring to your attention.

Following the reading of the statutes and rule the judge instructed:

> Now, the existence of such laws and the City Council rules serve to define the standard of conduct expected of the defendant Keane by the citizens of Chicago and the defendant's fellow aldermen. You may consider them for that purpose. The existence of such laws and City Council rules may also be considered by you as relevant to the defendant's intent to defraud if any such intent existed.

Although the defendant objected initially to the reading of the statutes and rule, once the trial judge decided they would be read, defendant's counsel approved the above instructions. We were directed to no point in the record where the defendant requested that the Illinois statutes and City Council rule be further explained to the jury. Therefore, we consider whether the failure to explain them further was plain error and thus reversible without objection below. Fed. R.Crim.P. 52(b).

There is no rule that the reading of a statute as part of a charge to the jury is per se insufficient. *See generally Casella* v. *United States*, 449 F.2d 277, 283 (3d Cir. 1971), *cert. denied*, 405 U.S. 929, 92 S.Ct. 981, 30 L.Ed.2d 803 (1972); *United States* v. *Powell*, 145 U.S. App. D.C. 332,

449 F.2d 994, 998 (1971). This is even more true where, as here, the statutes and rule were only one aspect of the whole case rather than the basis of the charges against the defendant. Complete instructions as to what actions can constitute a fraudulent scheme under the mail fraud statute without reference to the Illinois statutes and City Council rule were given. The statutes and rule were offered to show the general conduct expected of the defendant, so that the jury could better determine if there was a fraudulent scheme.[39] While it might have been helpful to the jury to give a more detailed explanation of the state laws and Council rule, we cannot say it was plain error not to do so.

The only question that remains with respect to the state statutes and the City Council rule is whether it was error for them to be judicially noticed, and presented to the jury.

Ill. Rev. Stat. ch. 24, § 3-14-4 provides that no municipal officer shall be interested in the purchase of any property sold for taxes or assessments.[40] On its face the provision

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[39] The defendant argues that the state statutory scheme was so complex that further explanation was required. The difficult question with regard to the statutes was their applicability to the present case, a question that the district judge resolved against the defendant.

[40] Ill. Rev. Stat. ch. 24, § 3-14-4 provides:

> No municipal officer shall be interested, directly or indirectly, in any contract, work, or business of the municipality, or in the sale of any article, whenever the expense, price, or consideration of the contract, work, business, or sale is paid either from the treasury or by any assessment levied by any statute or ordinance. No municipal officer shall be interested, directly or indirectly, in the purchase of any property which (1) belongs to the municipality, or (2) is sold for taxes or assessments, or (3) is sold by virtue of legal process at the suit of the municipality.

would appear to bar Keane from participating in any scavenger sales where property was being sold for taxes in Illinois. While we might be persuaded to agree with the defendant that such a broad reading of the statute would be beyond the obvious legislative purpose of avoiding conflict of interests, we nevertheless believe that a reasonable interpretation of the statute would have barred Keane from participating in the 1966 Cook County scavenger sale where a large number of parcels to be sold were located within Chicago.[41]

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[41] Although the 1966 scavenger sale was for properties on which county taxes were delinquent, we were advised at oral argument that the county would turn over to the City, a substantial amount of money with respect to parcels located within Chicago.

In addition, Ill. Rev. Stat. ch. 120, § 716a, the section pursuant to which the 1966 scavenger sale was held provides that "The State of Illinois or any taxing district . . . may bid at such sale." Similarly, Ill. Rev. Stat. ch. 120, § 725 provides:

> Any incorporated city, town or village, or corporate authorities, commissioners, or persons interested in any special assessment or installment thereof, may become purchaser at any sale, and may designate and appoint some officer or person to attend and bid at such sale on its behalf.

We reject the defendant's argument that the City could under no circumstances have been a bidder at this sale because the sale did not involve the extinguishment of special assessments. On their face neither section 716a nor 725 make such a condition a prerequisite to the City exercising its power to acquire real property for corporate purposes.

The above being true, it would not be unreasonable to believe that the legislature sought to prohibit purchases by municipal officals of property within their municipality sold for taxes or special assessments by the county as is the situation in this case. Not only does such an interpretation prevent potential conflict of interest but

(footnote continued)

The next statute of which the defendant complains is Ill.Rev.Stat. ch. 102, § 3 which prohibits any public official from being interested in any contract upon which such officer may be called upon to vote.[42] This is a classic conflict of interest statute. The government's position is that "compromise offers" and "minimum bids" were in effect agreements between the City and Keane on which he was required to vote. Thus, Keane was in a classic conflict of interest situation. Without deciding that a state court would apply this statute to this situation, it is sufficient to say that the jury was free to accept the defendant's argument that no contract was really involved because of the pro forma nature of the transaction and the alleged ministerial functions of the City Council. The introduction of the statute, however, was not reversible error.

(Footnote continued)

also avoids use of advance or inside information concerning properties within their city, by municipal officials.

In addition, section 3-14-4 prohibits municipal officers from being interested in the sale of any article whenever the price is paid from the treasury of the municipality. At least with respect to land sold to D.U.R. for the redevelopment program, the City was responsible for one-third of the cost. Even if the City made in kind contributions, as defendant contends, the reading of the statute was relevant as to the state policy against conflict of interests.

[42] Ill. Rev. Stat. ch. 102, § 3 provides in part:

> No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote.

Another Illinois statute which was judicially noticed and read to the jury and of which the defendant complains is Ill.Rev.Stat. ch. 102, § 3.1 which compels disclosure of all beneficial owners of property sold to any local governmental unit.[43] The defendant argues that the statute imposed a duty only on Hennessey to disclose the beneficial owners, since he was the managing agent of the properties. The government responds that a conspiracy was alleged in the indictment, and that Hennessey's failure to disclose Keane's interest in writing, so as to keep it from public view, is attributable to the defendant. A co-conspirator need not have knowledge of every detail of the plan. *See, e.g., Blumenthal* v. *United States,* 332 U.S. 539, 557, 68 S. Ct. 248, 92 L.Ed. 154 (1947); *United States* v. *Fellabaum,* 408 F.2d 220, 224 (7th Cir., *cert. denied,* 396 U.S. 818 and 858, 90 S.Ct. 55, 125, 24 L.Ed.2d 69, 109 (1969). Under these circumstances it was not error to read section 3.1 to the jury so it would be apprised of the fact that it was the

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[43] Ill. Rev. Stat. ch. 102, § 3.1 provides:

> Before any contract relating to the ownership or use of real property is entered into by and between the State or any local governmental unit or any agency of either and a trustee who has title to such real property or a managing agent having power to contract in relation to such real property, such trustee or managing agent must disclose the identity of every owner and beneficiary having any interest, real or personal, in such property. The disclosure shall be in writing and shall be subscribed by such trustee or managing agent under oath. This Section shall be liberally construed to accomplish the purpose of requiring the identification of the actual parties benefitting from any transaction with a governmental unit or agency involving the procurement of the ownership or use of real property thereby.

This statute became effective on September 30, 1969, and thereafter ten lots in which Keane had an interest were sold to the C.H.A.

policy of Illinois to require disclosure of interests in transactions conducted with public agencies.

The final statute, the reading of which the defendant objects to, is Ill.Rev. Stat. ch. 38, § 33-3 which provides that a public officer commits a misdemeanor when he "[k]nowingly performs an act which he knows he is forbidden by law to perform." Our disposition with regard to the previous statutes makes it clear that the reading of this statute was not error. [44]

In addition to objections to the Illinois statutes, the defendant also objects to the reading of City Council Rule 14 which provides:

> Every member who shall be present when a question is stated from the Chair shall vote thereon, unless excused by the Council or unless he is personally interested in the question, in which case he shall not vote.

The last sentence, which is mandatory in nature, on its face belies defendant's contention that the rule was directed only at requiring aldermen to vote on all matters and not directed at conflict of interests. The defendant makes similar arguments with respect to the rule as he made in connection with his effort to show that no fraudulent scheme against the City was involved. *See* Part II B, *supra*. For the same reasons we gave in rejecting defendant's claim earlier, it is clear that the reading of this rule was not erroneous and was properly admissible to show a standard of conduct expected among aldermen and to show Keane's fraudulent intent.

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[44] The question of whether defendant knowingly committed any act that was forbidden was, of course, a jury question, and is irrelevant to the issue of whether this section should have been read or not.

We conclude that it was not error for the district judge to judicially notice and then present to the jury the previously discussed Illinois Statutes and City Council rule.

V

The defendant's final contentions raise challenges with respect to certain evidentiary rulings and other matters which arose during the course of the trial.

A

The defendant argues that he was wrongfully deprived of a random assignment of a trial judge by the action of the Executive Committee of the Northern District of Illinois in assigning the case to Judge Decker pursuant to their procedures for handling "protracted, difficult or widely publicized cases." *General Order,* Northern District of Illinois, Eastern Division (May 17, 1972). For the reasons stated by the Executive Committee in its memorandum opinion, *United States* v. *Keane,* 375 F.Supp. 1201 (N.D. Ill. 1974), we find the defendant's argument without merit. *See also United States* v. *Braasch,* 505 F.2d 139, 147 (7th Cir. 1974), *cert. denied,* ..... U.S. ....., 95 S.Ct. 1562, 43 L.Ed.2d 775 (1975).

B

The next claimed error is with respect to the letter from Gerald Broderick, an attorney for C.D.A., to Robert Snow, land acquisition director for C.H.A., dealing with the acquisition of property by C.H.A. for C.D.A. use. *See* Part I C, *supra.* The challenged portion of the letter read "Mr. Bach (C.D.A. Executive Director] informed me [Broderick] that Mr. Swibel [C.H.A. Chairman and C.D.A. Director] told him to purchase these lots as swiftly as possible. . . ." The letter was introduced in support of the government's claim that Keane used undue influence on Swibel in order to have certain lots purchased.

A writing is a business record if it was made in the regular course of business and it was the regular practice of such business to make such a record. 28 U.S.C. § 1732. It is clear that a letter from one party to another, if done in the normal course of business can qualify as a business record. *See United States* v. *Kelly,* 349 F.2d 720, 772-73 (2d Cir. 1965), *cert. denied,* 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966); *Grummons* v. *Zollinger,* 240 F.Supp. 63 (N.D. Ind. 1964), *aff'd,* 341 F.2d 464 (7th Cir. 1965). It is also clear from all of the testimony concerning the relationship between C.H.A. and C.D.A., that the letter in question met the above requirements. [45]

The thrust of defendant's challenge is directed at the fact that Broderick's letter purports to repeat what Swibel told Bach as related by Bach to Broderick. The fact that Broderick, who was in effect the maker of the record, was told something by Bach does not render the record inadmissible. Many business records are made by the entry of data related by one employee either orally or through memorandum to another employee responsible for record-keeping. In this case, unlike the cases on which the defendant has relied,[46] Bach was under a "business duty" to report accurately to Broderick since the acquisition of land was an integral part of C.D.A.'s functions. *United States* v. *Karnap,* 477 F.2d 390, 392 (4th Cir.), *cert. denied,* 414

[45] The government states and the defendant does not challenge in his reply brief that defense counsel stipulated to the entire C.D.A. file in which the Broderick letter was included. Even when the letter was about to be read to the jury defense counsel conceded that it was a business record.

[46] *See, e. g., United States* v. *Burruss,* 418 F.2d 677 (4th Cir. 1969); *United States* v. *Shiver,* 414 F.2d 461 (5th Cir. 1969).

U.S. 867, 94 S.Ct. 66, 38 L.Ed.2d 87 (1973); *United States* v. *Smith,* 452 F.2d 638, 640 (4th Cir. 1971), *cert. denied,* 406 U.S. 910, 92 S.Ct. 1617, 31 L.Ed.2d 822 (1972). In addition, Broderick's letter was contemporaneous with Bach's report to him and there appears to have been no motive to misrepresent on the part of either Bach or Broderick. V. J. Wigmore, Evidence, §§ 1526, 1527 (3d ed. 1940).

The defendant argues, however, that Bach could not have Broderick include on the "business record" the fact that Swibel told him to "purchase these lots as swiftly as possible. . . ." because it is hearsay and Bach could not have testified as to what Swibel told him. We disagree.

Whether any given out-of-court statement is hearsay depends on the issue for which it is offered. In the present case the ultimate issue is whether Keane used his influence on Swibel, with the particular testimony intended to show that after Keane talked with Swibel that Swibel took action to have the lots purchased.

In one sense Swibel's statement is similar to an order, and is not capable of being true or false, and thus it is not offered for the truth of any matter asserted. It is offered solely for the fact that the statement was made, which standing by itself makes it relevant on the question of whether Keane had requested Swibel to purchase some of his properties.

To the extent that Bach's statement carries with it an implied assertion that Swibel desired or intended to have the lots purchased, it represents a declaration of his state of mind, capable of being shown only by Swibel's statements and subsequent actions and thus is admissible as an exception to the hearsay rule. VI Wigmore, *supra* § 1729; C. McCormick, Law of Evidence, § 294—95 (1972). There was no error in the introduction of the Broderick letter.

C

The defendant next contends that in certain respects the trial judge unduly limited his right to cross-examination.

He first complains about the sustaining of the government's objections to defendant's questions about the intent of Hennessey and Junior with regard to the alleged scheme. He argues that if neither Hennessey nor Junior had the requisite criminal intent, then Keane could not be convicted on the conspiracy count.

We have reviewed the question placed by defense counsel to Hennessey and we agree with the government's contention that it dealt only with Hennessey's state of mind with respect to Alpine's bargaining strength with public agencies, and not with respect to the alleged fraudulent scheme as a whole. This being so the issue of Hennessey's intent to defraud was never placed in issue.

Furthermore, there were a sufficient number of denials of wrongdoing by both Hennessey and the defendant for the jury to be apprised of their claim of no wrongful intent. The jury, however, had sufficient evidence of the actions of Hennessey, Junior and Keane from which to conclude that there existed the requisite criminal intent.

The defendant also argues that he was limited in his cross-examination of Earl Neal and Nathan Slutzky. With respect to Neal any error was clearly non-prejudicial and harmless in that the defendant adopted Neal as its own witness and obtained an answer to the question that had been the subject of the government's objection.

With respect to Slutzky the defense was not allowed to ask on cross-examination if he had ever received other than 10 percent minimum bid treatment when representing Hennessey and Keane on dates other than June 26, 1970.

Again, without holding that the trial judge improperly limited cross-examination, any error was clearly harmless. The defendant made its showing through government and defense summary exhibits that properties in which Keane had an interest did not always receive 10 percent treatment. In any case the fact is not a significant defense to the government's theory of the case and our resolution of the primary issues on appeal.[47]

D

The defendant next objects to the evidence introduced by the government in rebuttal. One of the questions placed into issue was Keane's intent to defraud with respect to the charged scheme. After first questioning Keane concerning a 1962 incident in which the City Council placed Keane on notice that, when voting on matters affecting his law clients he had an obligation to disclose this interest, the government inquired of Keane whether he had been involved in the representation of [illegible] American National Bank in 1967 with regard to a zoning matter on which he had voted. Keane denied any representation of the Bank, any conversation with Mr. Don Reuben concerning this matter and any payment for services rendered.

On rebuttal Reuben testified that he had in fact talked with Keane about the Bank's zoning problem, and that Keane and Alderman Paul Wigoda had agreed to work for the accomplishment of the Bank's request. In addition, evidence was introduced showing that shortly after Wigoda had received a check for $15,000 for representing the Bank, Keane was given a check from Wigoda for $7,500.

The evidence was proper to show a prior similar act by Keane of non-disclosure of matters in which he was

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[47] *See, e. g.*, note 19, *supra*.

interested and on which he voted. The evidence was probative of Keane's intent to defraud. Evidence of prior similar acts are "particularly appropriate where, as with mail fraud, criminal intent is an essential element of the crime charged." *United States* v. *Hutul,* 416 F.2d 607, 624 (7th Cir. 1969), *cert. denied,* 396 U.S. 1007, 1012 and 1024, 90 S.Ct. 562, 573, 599, 24 L.Ed.2d 499, 504, 517 (1970). *See also United States* v. *Hoffman,* 415 F.2d 14, 18—19 (7th Cir.), *cert. denied,* 396 U.S. 958, 90 S.Ct. 431, 24 L.Ed. 2d 423 (1969); *United States* v. *Marine,* 413 F.2d 214, 216 (7th Cir. 1969), *cert. denied,* 396 U.S. 1001, 90 S.Ct. 550, 24 L.Ed.2d 493 (1970).

E

The defendant also raises objections in relation to the charge given to the jury.[48]

The defendant challenges the instruction to the jury that it could consider the evidence concerning the American National Bank transaction with respect to Keane's intent during the pendency of the alleged scheme. The jury was clearly instructed that the defendant was not on trial for this transaction and for the reasons we gave for the admissibility of the rebuttal testimony, we find no error in the instruction given. *See* Part V D, *supra.*

The defendant next contends that it was error not to give his proffered instruction which stated that the C.H.A., C.D.A. and M.S.D. were state-created agencies, separate and distinct from the City of Chicago. The defendant argues that by refusing to give this instruction the jury was prevented from considering the defense theory of the case that Keane could not have been in a conflict of interest position with these agencies.

[48] We have previously discussed defendant's argument concerning the instructions given to the jury in connection with the Illinois State statutes and City Council rule 14. *See* Part IV, *supra.*

We note first that the government never contended, nor was it necessary to their case, that the agencies were one and the same as the City, and in any event Keane was not precluded from presenting evidence on his theory. *See e. g., United States* v. *Tremont,* 429 F.2d 1166, 1169—70 (1st Cir.), *cert. denied,* 400 U.S. 831, 91 S.Ct. 63, 27 L.Ed. 2d 63 (1970). Giving the proffered instruction would have served only to emphasize an evidentiary fact proved at trial by one side. *United States* v. *Thomas,* 484 F.2d 909, 912 (6th Cir. 1973), *cert. denied,* 415 U.S. 924, 94 S.Ct. 14, 28, 39 L.Ed.2d 480 (1974); *United States* v. *Terry,* 362 F.2d 914, 916 (6th Cir. 1966), *cert. denied,* 385 U.S. 1029, 87 S.Ct. 758, 17 L.Ed.2d 676 (1967); *Blauner* v. *United States,* 293 F.2d 723, 737—38 (8th Cir.), *cert. denied,* 368 U.S. 931, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961).

We note further that Keane was in a position to vote on acquisition sites for C.H.A. and C.D.A., so that the defendant's theory of no possible conflict of interest was not entirely accurate. In addition, the sale of properties to governmental agencies, in almost all cases, only completed the fraudulent scheme which had been implemented by Keane's actions in clearing special assessments liens or his use of advance information in acquiring parcels. In any event the failure to give the instruction was harmless error. In cases of sales to C.H.A. and C.D.A. where the claim of undue influence arguably was necessary to sustain the conviction,[49] there was a sufficient relationship be-

[49] The only counts to which the instruction the defense offered could have been relevant were Counts IV and XII involved sales of properties to the C.H.A. and C.D.A. None of the other counts were premised on an undue influence charge. Count IV involved properties which had been the subject of City Council action and therefore has a basis for the finding of guilty independent of the undue influence charge.

tween the functions of the agencies and the City Council for the jury to believe that Keane was in a position to exert influence notwithstanding the fact that the agencies were independent.

F

The final charge of reversible error is in connection with the closing argument of the government. Specifically defendant claims that the prosecution repeatedly and without evidence in the record referred to Keane's power and "clout" and his potential control of the testimony of many of the witnesses called in this case.[50]

It is clear that "[w]hile a continuously inflammatory argument may be grounds for reversal, courts have long recognized that, on the other hand, the prosecutor cannot be restricted to a sterile recitation of uncontroverted facts." *United States* v. *Greene,* 497 F.2d 1068, 1085 (7th Cir. 1974), *cert. denied,* 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed. 2d 839 (1975). *See also Brandom* v. *United States,* 431 F.2d 1391, 1397 (7th Cir. 1970), *cert. denied,* 400 U.S. 1022, 401 U.S. 942, 91 S.Ct. 586, 950, 27 L.Ed.2d 634, 28 L.Ed.2d 223 (1971). In addition we must consider defendant's claim in the context of the whole closing argument and the fact that the alleged errors related to only a brief part of a hotly contested four-week trial. *Greene, supra* at 1085. Similarly, it is clear that "unflattering characterizations of

[50] The only factual inaccuracy which the defendant claims the government made was that Keane had denied voting on the American National Bank zoning matter which in fact he did not deny. It is clear from the record that counsel accidentally misspoke. Indeed, the government was attempting to show that Keane did vote without disclosing his interest. The trial judge upon defense objection stated that he was going to rely on the jury for their recollection of the evidence. The error was clearly harmless. *United States* v. *Maenza,* 475 F.2d 251, 254 (7th Cir. 1973).

a defendant will not provoke a reversal when such descriptions are supported by the evidence." *United States* v. *Windom,* 510 F.2d 989, 994 (5th Cir. 1975; *United States* v. *Cook,* 432 F.2d 1093, 1106 (7th Cir. 1970), *cert. denied,* 401 U.S. 996, 91 S.Ct. 1224, 28 L.Ed.2d 535 (1971).

We find the defendant's argument as to the characterization of Keane without merit. There was sufficient evidence of his long tenure as an alderman and as chairman of the powerful Finance Committee. Similarly, there was proof that he appointed the chairman of the Subcommittee on Special Assessments and served on other council committees and other public commissions. Keane contacted numerous public officials and others in attempts to dispose of Alpine, THAK and Wabash lots, and it was not improper for the government to in effect argue that these contacts were available to Keane because of his position of power.[51]

With respect to government counsel's remarks that some of the witnesses called and others not called were subject to the influence of Keane, we find no error. There was no government statement that Keane had suborned perjury, only that some of the witnesses called were in positions where they may have felt obliged to please Keane. This amounted to no more than permissible argument on their

[51] In addition we reject the defendant's claim that references to Keane as a wealthy man and the ease with which he, as opposed to others, obtained a large loan was reversible error. While it is true that appeals to a juror's pecuniary interest are improper, we believe that here the reference was not directly related to the pecuniary interest of the jurors. The reference to the ease of obtaining loans was consistent with the government's theory of Keane's use of influence to obtain benefits. There was no statement that the benefit to Keane was at the expense of the jurors. Thus this case is unlike *United States* v. *Trutenko,* 490 F.2d 678 (7th Cir. 1973).

purpose for testifying as they did and on their credibility. *United States* v. *DeAngelis*, 490 F.2d 1004, 1008 (2d Cir.), *cert. denied*, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 306 (1974); *United States* v. *Capello*, 327 F.2d 378, 379 (2d Cir. 1964); *United States ex rel. Kirk* v. *Petrelli*, 331 F. Supp. 792, 796 (N.D.Ill.1971), *aff'd by order*, 492 F.2d 1245 (1974). *See also ABA* Standards for Criminal Justice. *The Prosecution Function*, § 5.8(b), commentary, (approved draft, 1971).

The evidence generally showed close working relationships between Keane, and Hill, Neal and Swibel, individuals on which the government commented during closing argument. The government can prove its case in any manner it desires, so long as it meets its burden in a fair manner. If it desires to call some witnesses only for limited purposes or chooses not to call others and the defendant, as here, argues that this represents a weakness in the government case, the defendant invites a response as to why the government chose the trial strategy that it did. *See e. g., United States* v. *Nowak*, 448 F.2d 134, 141 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039, 92 S.Ct. 714, 30 L.Ed.2d 731 (1972); *United States* v. *Lawler*, 413 F.2d 622, 628 (7th Cir. 1969); *cert. denied*, 396 U.S. 1046, 90 S.Ct. 698, 24 L.Ed.2d 691 (1970). There was no reversible error committed by the prosecutors during their closing and rebuttal arguments.

We have examined other contentions of trial error and find them equally without merit.

For all of the foregoing reasons we reverse the conviction as to mail fraud Counts I, XI, XIII, and affirm the conviction on mail fraud Counts II, III, IV, VI, VII, VIII, X, XII, XIV, XV, XVI, XVII, XIX, XX. We also affirm the Count XXI conspiracy conviction.

Affirmed in part and reversed in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 20, 1975.

Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

No. 74-1979 vs.

THOMAS E. KEANE, Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 74 CR 359
Bernard M. Decker, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no member of the panel and no judge in regular active service** having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing and suggestion that it be reheard *en banc* be, and the same are hereby, DENIED.

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* Senior District Judge William G. East of the United States District Court for the District of Oregon is sitting by designation.

** Judge John Paul Stevens disqualified himself from any consideration of the petition for rehearing *en banc*.

Supreme Court, U. S.
FILED
JAN 15 1976
MICHAEL RODAK, JR., CLERK

No. 75-867

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supplement to Point III

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In the
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No. 75-867

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SUPPLEMENT TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supplement to Point III

On January 5, 1976, after the filing of the Petition for a Writ of Certiorari in this cause, the Court of Appeals for the Seventh Circuit rendered an opinion in *United States of America* v. *Craig, et al.*, a copy of which is reprinted as Appendix hereto.

In that case, the indictment charged, *inter alia*, that certain Illinois state legislators, in violation of the mail fraud statute (18 U.S.C. §1341), had engaged in a scheme to defraud the citizens of Illinois of their "loyal, faithful and honest services in their official positions" and "of their

right to have the legislative business of the state . . . conducted honestly." (Slip, p. 2) One of the legislators answered all questions put to him by postal inspectors, the Assistant United States Attorney and the grand jury concerning his actions as a legislator. Subsequently, he moved to suppress his statements on the ground they were obtained in violation of the federal and state Speech or Debate Clauses. The Court of Appeals stated the primary question to be whether state legislators have a speech or debate privilege, conferred either by the Illinois constitution or as a matter of federal common law, which bars the admission of certain evidence against state legislators in a federal criminal prosecution.

The Court held that such a privilege exists but that it had been waived in the instant case.* In doing so, the Court by illustration voiced precisely the historical reason why federal courts should not become embroiled in fashioning remedies for local criminal conduct. Just as the Seventh Circuit in *Markert* was embarrassed to fashion a federal common law rule involving the Speech and Debate privilege, the Court here should not enforce a federal interpretation of peculiarly local rules.

The Court in considering the existence of the privilege also carefully considered the state's role and its interrelationship with the federal government in cases involving alleged "political corruption." Inherent in the Court's finding is that the role of federal authorities in this area is, properly, limited. This is in accord with traditional

* The United States attorney has stated in the news media that his office intends to seek review.

notions of federal-state comity. See *Younger* v. *Harris*, 401 U.S. 37, 44. As stated by the Court,

> "Perhaps somewhat idealistically, the Court in *Tenney* v. *Brandhove, supra,* 341 U.S. at 378, stated that legislative abuses were to be corrected by self-discipline and the electorate. Subsequently, in *United States* v. *Brewster, supra,* 408 U.S. at 520, the Court more prudently noted that not only the 'jurisdiction of Congress to punish its Members is not all-embracing,' but also that the power of self-discipline has inherent limits. Here, however, the State of Illinois is under no such disabilities. *While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved.* Federalist No. 17, *supra* at 120." (Emphasis added)

Moreover, as stated by the Seventh Circuit, a statute of general criminal applicability, such as the mail fraud statute, does not authorize the federal courts to regulate the conduct of local governmental officials. No compelling federal interest is served by using such a statute to prescribe the conduct of elected state officials. (Slip, p. 10, f.n.4)

The principles enunciated are applicable to the case at bar. Here, the Federal Government, through the mail fraud statute, seeks to root out corruption allegedly existing in the Chicago City Council.*

In seeking to perform its task, the Federal prosecutorial agencies have intruded into the affairs of the City Council in matters heretofore considered to be essentially local

* By virtue of Home Rule provisions of the Illinois Constitution of 1970, the City Council of the City of Chicago is, in effect, the "state" legislature for the city. (S.H.A. Const. Art. 7 § 6.)

and governed by local customs, mores, statutes and procedures.

Central to the charge against petitioner that he defrauded the citizens of Chicago and his fellow aldermen of his "loyal, faithful and honest services," was the charge that he had violated a rule of the City Council of the City of Chicago which provided that "every member who shall be present when a question is stated . . . shall vote thereon, unless excused by the Council, or unless he is personally interested in the question, in which case he shall not vote." The trial court directed that the City Council rule served "to define the standard of conduct expected of the defendant . . . by the citizens of Chicago and the defendant's fellow aldermen," (T. 3166-67) even though aldermen who testified concerning the meaning of the rule were, in the circumstances of this case in which the City had no financial interest, divided on the issue. (See Petition, p. 15, T. 2495-2496, 1575, 2579, 2588, 1840, 1338-1339, 1348, 1353, 1751, 1757, 1810, 1846, 1824, 1861-1862).

Thus, the local rule was submitted by a federal prosecutor to a federal judge for further consideration by a federal jury. The federal court not only held petitioner accountable for certain legislative acts, but it also imposed a standard which may have been contrary to the local legislative purpose. As stated in *Craig:*

> ". . . the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives. *Tenney* v. *Brandhove,* 341 U.S. 367, 378."

In the instant case, the primary responsibility to root out alleged political corruption has been diverted from the state agencies, elected officials have been ignored in

their understanding of their functions, piecemeal consideration has been given to a complicated set of state and local procedures and principles of federal-state comity have been disregarded.

CONCLUSION

For the foregoing reasons, in addition to those heretofore recited in the Petition for Writ of Certiorari, Petitioner respectfully requests that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1592

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROBERT CRAIG, THOMAS J. HANAHAN and LOUIS A. MARKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 74 CR 877

ALFRED Y. KIRKLAND, *Judge*

Argued September 26, 1975—Decided January 5, 1976

Before CUMMINGS and TONE, *Circuit Judges*, and KUNZIG, *Judge.**

* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

CUMMINGS, *Circuit Judge.* In December 1974, appellee Louis A. Markert, and co-defendants Robert Craig and Thomas J. Hanahan were indicted on two charges of political corruption. Count One alleged that while members of the Illinois House of Representatives they and their unindicted co-conspirator Pete Pappas allegedly extorted $1500 from members of the Illinois Car and Truck Renting and Leasing Association, inducing the payments "under color of official right" in violation of the Hobbs Act (18 U.S.C. §1951). Count Two charged that the same individuals engaged in a scheme to defraud the citizens of Illinois of their "loyal, faithful and honest services in their official positions" and "of their right to have the legislative business of the State of Illinois conducted honestly" by accepting $1500 to block passage of a certain bill. The scheme was said to violate the Mail Fraud Statute (18 U.S.C. §1341).

During the grand jury's investigation of alleged corruption in the Illinois General Assembly, the appellee consented to interviews with postal inspectors in September 1973 and to an interview with postal inspectors and an Assistant United States Attorney in November 1974. In addition, he testified under subpoena before the grand jury on September 13, 1973. At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination. He declined, however, to invoke this privilege and answered all questions put to him by the postal inspectors, Assistant United States Attorney and before the grand jury.

In February 1975, Markert moved to suppress his grand jury testimony and the other statements he gave to government agents on the ground that they were obtained

from him in violation of the federal and state Speech or Debate Clauses. A few weeks later, the district judge ruled that Markert was entitled to the protection of the privilege accorded by the Speech or Debate Clause of the Illinois Constitution.[1] Consequently, the district court ordered Markert to provide "a concise written statement of what evidence, if any, was taken from him in violation of his [Illinois] constitutional privilege."

Subsequently, the district court handed down an unreported memorandum opinion and order granting Markert's motion to suppress certain portions of his grand jury testimony and parts of the interviews he gave to postal inspectors and the Assistant United States Attorney. The court decided that a legislator could not waive the privilege accorded by the Speech and Debate Clause of the State Constitution and "that the executive and judicial branches are prohibited from inquiring into legislative activities." The Government has appealed pursuant to 18 U.S.C. §3731.

The primary question is whether state legislators have a Speech or Debate privilege, conferred either by the Illinois Constitution or as a matter of federal common law, which bars the admission of certain evidence against state legislators in a federal criminal prosecution. If so, we must then decide whether Markert waived that privilege.

---

[1] In pertinent part, Article 4, Section 12, of the Illinois Constitution of 1970 provides:

> "* * * A member of the [General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. * * *"

I

The Federal Rules of Evidence became effective July 1, 1975.[2] Rule 501 is the pertinent rule and provides as follows:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

This version of Rule 501 does not alter the pre-existing criminal law in the federal courts. The standard embodied in the first sentence of Rule 501 was derived from Rule 26 of the Federal Rules of Criminal Procedure. See Senate Report No. 93-1277, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7051, 7058 (1974); House Report No. 93-650, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7075, 7082 (1974). Rule 26 provided:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[3]

[2] Under *United States* v. *McCarthy*, 445 F.2d 587, 590-591 (7th Cir. 1971), this Circuit has applied these rules even before their effective date.

This rule was promulgated in 1944 (effective in 1945) as part of the Federal Rules of Criminal Procedure. Prior to those rules, the law of evidence to be applied in federal criminal cases was uncertain. See Howard, Evidence in Federal Criminal Trials, 51 Yale L.J. 763 (1942). Neither state law nor federal law clearly applied. The governing statute, the Rules of Decision Act, provided that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in Courts of the United States, in cases where they apply" (1 Stat. 92, now 28 U.S.C. §1652). As interpreted by the Supreme Court, the statute required the federal courts in a criminal case to apply the law of the state in which the trial was held as it existed in 1789. *United States* v. *Reid*, 53 U.S. 361, 363. If the state was admitted to the Union after 1789, the common law as of the date of admission controlled. *Logan* v. *United States*, 144 U.S. 263, 303. These principles, however, were not strictly followed. At times, the Supreme Court examined state laws of evidence in the light of "general authority and sound reason," rejecting them where they were antiquated or inappropriate. *Benson* v. *United States*, 146 U.S. 325, 335; see *Rosen* v. *United States*, 245 U.S. 467. Finally in *Funk* v. *United States*, 290 U.S. 371, and

[3] After the Federal Rules of Evidence were adopted in 1975, Rule 26 was amended to provide as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

Wolfle v. *United States*, 291 U.S. 7, the Court abandoned any strict adherence to state rules of evidence in criminal cases, adopting instead a flexible standard which would allow the federal courts to modify or disregard local laws of privilege "in the light of reason and experience." 291 U.S. at 12. These two cases were the basis for Rule 26. See Advisory Committee Notes to Rule 26; Vanderbilt, New Rules of Criminal Procedure, 29 A.B.A.J. 376, 377. Under Rule 26 the federal courts were free to fashion a federal law of evidence consistent with the Federal Rules of Criminal Procedure and Congressional statutes. See *Elkins* v. *United States*, 364 U.S. 206, 216; Cummings, The Third Adventure, 29 A.B.A.J. 654, 655. As the 1940 Criminal Rules Enabling Act (18 U.S.C. § 3771) provided in pertinent part:

> "All laws in conflict with such rules [of criminal procedure] shall be of no further force and effect after such rules have taken effect."

The House Committee Report on Section 3771 showed that its purpose was to render it unnecessary to "search the common law, statutes, and constitutional provisions of the States • • •" (H. Rep. No. 2492, 76th Cong., 3d Sess., 2 (1940)), in determining the admissibility of evidence in criminal cases. Thus Rule 26 envisioned that the admissibility of evidence in criminal cases in federal courts would be governed by federal law and would not be dependent upon diverse state laws, including state constitutional provisions. *Elkins* v. *United States, supra*, 364 U.S. at 216; *Heathman* v. *United States District Court*, 503 F.2d 1032, 1034 (10th Cir. 1974).

Similarly, Rule 501 contemplates that "federal privilege law applies in criminal cases." Conference Report No. 93-1597, 93rd Cong., 2d Sess., 4 U.S. Code, Cong. & Admin. News 7098, 7100 (1974). However, nothing in the language of the rule or its legislative history indicates that courts are prohibited from recognizing as a matter of federal common law a speech or debate privilege for state legislators. The legislative history of Rule 501 was indeed stormy. The Supreme Court Advisory Committee's draft contained nine non-constitutional privileges (56 F.R.D. 234-256), and its proposed Rule 501 provided that only the enumerated privileges and those required by the federal Constitution or Act of Congress need be recognized by the federal courts (56 F.R.D. 230). This draft of Article V on Privileges aroused such furor when the Supreme Court submitted it to Congress that the House Committee on the Judiciary eliminated the nine privileges in favor of the present Rule 501. This was done because the rules as submitted to Congress "contained controversial modifications or restrictions upon common law privileges." Senate Rep. No. 93-1277, *supra*, 4 U.S. Cong. & Admin. News 7058 (1974). With this backround, surely there would have been a hint in the history of revised Rule 501 if Congress had intended to override the common law privilege inherent in the Speech or Debate Clause of the federal and state constitutions.

These rules mandate that we neither categorically reject nor accept the defendant's claim of a speech or debate privilege. Rather, we are instructed to determine whether "the principles of the common law • • • in the light of reason and experience" dictate the recognition of a federal common law speech or debate privilege to be applied in federal criminal prosecutions of state legislators. We hold that Markert has such a privilege.

A product of the 17th century struggle for parliamentary supremacy, legislative freedom of speech and debate "was taken as a matter of course by those who severed

the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove*, 341 U.S. 367, 372. The Speech or Debate Clause of the federal Constitution was adopted at the constitutional convention without discussion or dissent. See V Elliot's Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911). Most states have incorporated similar provisions in their constitutions. See *Tenney* v. *Brandhove, supra*, 341 U.S. at 373-375. And in its most recent cases, the Supreme Court has reaffirmed that the Speech or Debate clause is an essential tenet of the American political system. See *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491; *Doe* v. *McMillan*, 412 U.S. 306; *Gravel* v. *United States*, 408 U.S. 606; *United States* v. *Brewster*, 408 U.S. 501.

The clause originated, and its purpose remains, "to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney* v. *Brandhove, supra*, 341 U.S. at 375. It is immaterial that the legislator may have had an unworthy motive. As Justice Frankfurter explained in *Tenney* (at 377):

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

This protection of the legislature's independence applies whether the judicial proceeding is civil or criminal. The privilege developed in England in response to the King's seditious libel prosecutions of dissident members of Parliament. See *United States* v. *Johnson, supra*, 383 U.S. at 181-183. Similarly, the Supreme Court has held that the clause applies to criminal prosecutions of members of Congress. *United States* v. *Brewster, supra; United States* v. *Johnson, supra*. The express purpose of the clause is to protect legislators "against possible pros-

ecution by an unfriendly executive and conviction by a hostile judiciary" for their acts as legislators. *United States* v. *Johnson, supra*, 383 U.S. at 179. The clause therefore contains substantive and evidentiary elements. The content of a legislator's speech on the floor of the chamber or comment in Committee room cannot be made the basis of either civil (*Doe* v. *McMillan, supra*, 412 U.S. at 312; *Powell* v. *McCormack*, 395 U.S. 486, 502-503; *Dombrowski* v. *Eastland*, 387 U.S. 82, 85; *Tenney* v. *Brandhove, supra*, 367 U.S. at 377; *Kilbourn* v. *Thompson*, 103 U.S. 168, 203) or criminal liability. *Gravel* v. *United States, supra*, 408 U.S. at 624; *United States* v. *Brewster, supra*, 408 U.S. at 514; *United States* v. *Johnson, supra*, 383 U.S. at 180. Nor may legislators be required to answer questions about their legislative activities. *United States* v. *Brewster, supra*. 408 U.S. at 525; *United States* v. *Johnson, supra*, 383 U.S. at-183. In *Johnson*, the Court approved the English rule that "the motives or intentions of members of either House [of Parliament] cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." 383 U.S. at 183, quoting *Ex parte Wason*, L.R. 4 Q.B. 573, 577 (1869). Although construed broadly to protect any activity "generally done in a session of the House by one of its members in relation to the business before it" (*United States* v. *Johnson, supra*, 383 U.S. at 179; *Kilbourn* v. *Thompson, supra*, 103 U.S. at 204), the privilege does not apply to a criminal proceeding which "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States* v. *Brewster, supra*, 408 U.S. at 510; *United States* v. *Johnson, supra*, 383 U.S. at 185.

Only the evidentiary aspect of the speech or debate privilege is involved in this appeal. Markert contends

simply that he cannot be required to answer questions put to him by the grand jury and government officials if the inquiry delves into his conduct as a legislator on matters before the Illinois General Assembly. This evidentiary privilege is a necessary prophylactic. *United States* v. *Johnson, supra,* 383 U.S. at 182. Its purpose is the same as that of the substantive aspect of the Speech or Debate Clause: preservation of the independence of the legislature. *Id.*

The Government does not challenge this construction of the speech or debate privilege. It concedes that were it attempting to prosecute a member of Congress, he would enjoy the privilege Markert asserts in this case. The Government contends however that the privilege should apply only to questioning of legislators by co-equal branches of government. The policy served by the privilege, the Government argues, is separation of powers; because the national government is supreme, the privilege is inapplicable in this case.

This argument ignores the federal nature of the American system of government. The Constitution confers upon the national government only limited powers. Those powers not granted remain within the domain of the separate states. The reservation of power for the states is not only the import of the Tenth Amendment but also a basic understanding of the draftsmen of the Constitution. "The proposed Constitution, so far from implying an abolition of the State governments * * * leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every national import of the terms, with the idea of a federal government." The Federalist, No. 9 at 76 (New American Library Ed. 1961).

The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, *supra* at 308 (New York), at 469 (Pennsylvania); III Elliot's Debates, *supra* at 171 (Virginia). Yet in state after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, *supra* at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, *supra* at 316 (South Carolina). The Constitution creates a federal system of government; people are subject to two sets of laws, those of the national government and those of the states. The essence of this federal structure is that on matters of national importance, the Congress shall legislate; on matters of local concern, the state legislatures shall enact the laws. See The Federalist No. 38, *supra;* Grant, The Nature and Scope of Concurrent Power, 34 Columbia L. Rev. 995 (1934). Therefore, state legislatures acting within the scope of their powers perform a function as vital as the governance of the state as the role Congress fulfills with regard to the nation as a whole.

Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile execu-

tive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive make no difference.

In the present case, the United States Attorney commendably conceded at the oral argument that a refusal to recognize a speech or debate privilege for state legislators would have an inhibiting effect on the conduct of members of the Illinois General Assembly. This threat to the legislature's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. Art. 1 § 6. Deterring a legislator from advancing a point of view, or influencing how he votes by requiring him to explain his motives before a grand jury is precisely the evil the speech or debate privilege intends to prevent. The protection of the First Amendment does not ameliorate this threat to legislative independence. The protection of freedom of speech does not provide a privilege against giving evidence. *Branzburg* v. *Hayes*, 408 U.S. 665. It does not prohibit a jury from questioning the motives of the speaker. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254. Therefore, it would not be an adequate substitute for the speech or debate privilege. Thus, in view of the purposes of the speech or debate privilege, its common law history, and the important role of the states in governing the country, we hold that state legislators are entitled to a federal common law speech or debate privilege applicable in federal criminal prosecutions. The privilege is simply too important to our conception of government to be abolished by judicial fiat in a federal criminal prosecution under a statute of general applicability.[4] The concurring opinion herein incorrectly, we believe, assumes that the existence of this privilege is dependent on an underlying immunity.[5]

Principles of federal-state comity—"a proper respect for state functions" (*Younger* v. *Harris*, 401 U.S. 37, 44) —reinforce our conclusion that this particular privilege was not rescinded by the Federal Rules of Evidence. Per-

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[4] The Hobbs Act (18 U.S.C. § 1951) and the Mail Fraud Statute (18 U.S.C. § 1341) are not narrowly drawn attempts by Congress to regulate the conduct of state legislators. These statutes therefore provide no compelling federal interest which requires us to consider whether the privilege may be abrogated by Congress.

[5] The concurring opinion argues that because state legislators have no official immunity from federal criminal prosecutions, they should likewise have no privilege. But the evidentiary privilege conferred on members of Congress follows not from any substantive immunity but from the Speech or Debate Clause itself. A member of Congress is not immune from prosecution on charges of bribery or conflict of interest. *United States* v. *Brewster, supra; United States* v. *Johnson, supra*. Yet the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts. *Ibid*. The privilege rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives. *Tenney* v. *Brandhove, supra*, 341 U.S. at 378.

Implicitly, the concurring opinion argues that this principle of government is not applicable here because state legislators have no reason to expect interference in their affairs by a United States Attorney. This argument not only ignores the reality of the case, evidenced by the concession of the United States Attorney at oral argument that Illinois legislators would be inhibited in their official conduct were no privilege recognized; it also disregards the wisdom of the founding fathers, who feared that the federal government would impermissibly intrude upon the power of the states to govern their own affairs. See Federalist Nos. 23, 29, *supra*.

haps somewhat idealistically, the Court in *Tenney* v. *Brandhove, supra,* 341 U.S. at 378, stated that legislative abuses were to be corrected by self-discipline and the electorate. Subsequently, in *United States* v. *Brewster, supra,* 408 U.S. at 520, the Court more prudently noted that not only the "jurisdiction of Congress to punish its Members is not all-embracing," but also that the power of self-discipline has inherent limits. Here, however, the State of Illinois is under no such disabilities. While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved. Federalist No. 17, *supra* at 120. Admittedly, legislators may abuse their freedom of debate and discussion. But the common law history of the privilege in England and the United States teaches emphatically that it is better to tolerate the potential abuses than to risk the harm to our system of government that would result from inhibiting a legislator's discharge of the responsibility conferred upon him by the electorate. Our decision today does nothing more than recognize that important judgment.

II

Having determined that Markert enjoys a common law speech or debate privilege, we must now determine whether he waived its protection. The Speech or Debate clause is intended to provide a personal safeguard for the individual legislator and an institutional immunity for the legislature itself. *United States* v. *Brewster, supra,* 408 U.S. at 507; *United States* v. *Johnson, supra,* 383 U.S. at 179. This dual protection follows from the belief that the legislature's independence is predicated upon the independence

of its members. *Tenney* v. *Brandhove, supra,* 341 U.S. at 377. As long as the individual legislator can perform his function free from the threat of judicial and executive interference, the policy of the privilege is not offended. It therefore follows that to the extent the inquiry impugns only the personal independence of the legislator and does not call into question the independence of other members of the body, the protection of the speech or debate privilege can be waived.

In a criminal prosecution, a state legislator has a right under the due process clause to put into issue his own conduct as a representative if relevant. See *United States* v. *Nixon,* 418 U.S. 683, 711; *Washington* v. *Texas,* 388 U.S. 14, 19. Once introduced, the prosecution must be permitted to respond. Recognition of a privilege means that some relevant evidence will not be before the trier of fact. Because of the policies supporting the privilege, the courts are willing to tolerate this "derogation of the search for truth." *United States* v. *Nixon, supra,* 418 U.S. at 709. However, it is a far more severe, and we believe impermissible, distortion of that process to admit evidence without affording the other party a chance to respond, or to hear testimony without permitting the opposition to cross-examine. This is fundamentally inconsistent with the view that "the two-fold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger* v. *United States,* 295 U.S. 78, 88. Once the legislator has chosen to make his conduct an issue, the court's interest that its processes not be subverted outweighs the claim of privilege. See *Branzburg* v. *Hayes, supra.*

This analysis is consistent with the Supreme Court's note in *Gravel* v. *United States, supra,* 408 U.S. at 622 n. 13, that a Senator can waive this aide's claim of privi-

lege.[6] If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual. *E.g., United States* v. *Pauldino*, 487 F.2d 127 (10th Cir. 1973), certiorari denied, 415 U.S. 981; *United States* v. *Moorman*, 358 F.2d 31 (7th Cir. 1966), certiorari denied, 385 U.S. 866; *Johnson* v. *United States*, 270 F.2d 488 (9th Cir. 1959), certiorari denied, 362 U.S. 924. The essence of a waiver is voluntary conduct. A decision to forego the protection of a privilege, to be valid, must be a free choice, and hence presents no challenge to the independence of the legislator.[7] Markert has not shown why his privilege should

[6] The defendant contends that this footnote means that the Senator could simply acknowledge to the court that the aide was not acting as his agent. If so, the footnote is extraneous because the privilege would not apply. Therefore, it seems likely that the Court meant a Senator could require his aide to testify about actions which, if done by the Senator, would be within the scope of the privilege. Since the aide and the Senator are considered one for the purposes of the privilege (*Gravel* v. *United States*, *supra*, 408 U.S. at 616), the Senator must be able to waive the protection of the clause for himself as well as his aide.

[7] Because the Speech or Debate clause embodies institutional as well as personal protection, the scope of the waiver must be carefully limited. The difficulty is that the individual legislator's testimony and other evidence may involve not only his conduct but also that of the body as a whole. At that point the law is clear that "the Speech or Debate Clause clearly proscribes at least some of the evidence." *United States* v. *Johnson*, *supra*, 383 U.S. at 173. A clear threat to the institution's ability to function would be presented if members knew that one of their colleagues, by waiving his privilege, could raise doubts in the minds of grand jurors about the propriety of their conduct. Thus any waiver must be strictly limited to the conduct of the individual representative.

not be waivable as long as the waiver is limited to his own conduct.

In deciding whether Markert waived his privilege in this case, we need not find a knowing and intelligent forfeiture of the right. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *United States* v. *Escander*, 465 F.2d 438, 411 (5th Cir. 1972); *United States* v. *Michael*, 426 F.2d 1067, 1069 (7th Cir. 1970). The lesser standard of voluntariness applies because the policy served by the privilege is not related to the fairness of the trial. *Schnekloth* v. *Bustamonte*, 412 U.S. 218, 242. Under the test of voluntariness, it need be shown only that the testimony is the "product of an essentially free and unconstrained choice by its maker." *Schnekloth* v. *Bustamonte, supra*, 412 U.S. at 225; *Columbe* v. *Connecticut*, 367 U.S. 568, 602. The question is the defendant's subjective state of mind, to be determined after an examination of all the facts and circumstances. *Schnekloth* v. *Bustamonte, supra*, 412 U.S. at 249; *Kelly* v. *Peyton*, 420 F.2d 912, 914 (4th Cir. 1970).

Markert contends that the facts of this case indicate that the decision to testify was not freely made. The heart of his argument is that he was not informed of his right to claim a speech or debate testimonial privilege either by the Government or by his own counsel. However, the Supreme Court has never held that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary. *Schnekloth* v. *Bustamonte, supra*, 412 U.S. at 227; accord, *Byrd* v. *Lane*, 398 F.2d 750, 755 (7th Cir. 1968), certiorari denied, 398 U.S. 1020. When he appeared before the grand jury, he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice

to testify, he waived the instant privilege. Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any of his rights. See *United States* v. *Calandra*, 414 U.S. 338, 346; *Kastigar* v. *United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the working of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege.

The order of suppression is reversed and the cause is remanded for further proceedings consistent herewith.

TONE, *Circuit Judge*, concurring. I concur in the result. I agree with the court that the speech or debate clause of the Illinois Constitution is inapplicable in this federal criminal proceeding, and that the question to be decided is whether the federal common law of evidence includes the privilege asserted. I disagree, however, with the court's view that, absent waiver, the defendant could claim a speech or debate privilege under the federal common law of evidence.

Several recent opinions of the Supreme Court have made it clear that the protection afforded state legislators from liability under federal law for acts done in their legislative roles, see *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), is not based upon the speech or debate clause of the Federal Constitution, see *United States* v. *Brewster*, 408 U.S. 501, 516 n. 10 (1972), a clause that applies only to Congress, but rather upon the common-law doctrine of official immunity. See *Wood* v. *Strickland*, 420 U.S. 308, 316-318 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 243-244 (1974); *Doe* v. *McMillan*, 412 U.S. 306, 318-320 (1973). This is the same doctrine that was applied in *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967), to provide immunity

to a judge for acts done in the course of his judicial duties.[1]

The speech or debate clause of the Federal Constitution protects members of Congress from being "questioned in any other Place" concerning, the Supreme Court has held, "legislative acts or the motivation for actual performance of legislative acts." See *United States* v. *Brewster*, *supra*, 408 U.S. at 509. The clause provides both immunity from liability and a commensurate privilege against disclosure. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). The privilege against disclosure and the immunity from liability should also be commensurate when the basis for protection is common-law official immunity. Where there is no immunity, it would be incongruous, if not useless, to recognize an evidentiary privilege. Accordingly, I think that whether the claimed privilege should be recognized as a development in the federal common law of evidence depends on whether there is an underlying immunity.

The common-law immunity of state legislators has not been held to be coextensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech-or-debate immunity is broader than official immunity. The former bars injunction actions directed at legislative activities of Congress. *E.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Powell* v. *McCormick*, 395 U.S. 486 (1969). The doctrine of official immunity,

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[1] *Tenney* v. *Brandhove* and *Pierson* v. *Ray* held that Congress had not intended by adopting the Civil Rights Acts to abrogate the official immunity of legislators and judges, supported as it was by strong tradition and sound reasons.

on the other hand, has been held by one court not to bar injunctive relief against state legislative activities which offend federal law, *Jordan* v. *Hutcheson,* 323 F.2d 597 (4th Cir. 1963), and in other cases federal injunctions against state legislative action have been sustained without discussion of the question of immunity. *E.g., Bond* v. *Floyd,* 385 U.S. 116 (1966); *Bush* v. *Orleans Parish School Board,* 191 F.Supp. 871 (E.D. La.), *aff'd sub nom. Denny* v. *Bush,* 367 U.S. 908 (1961).

Unlike federal speech or debate immunity, see *United States* v. *Johnson,* 383 U.S. 169 (1966), common-law official immunity has not been extended to criminal liability. In *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974), the court said:

> "[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct as proscribed by an Act of Congress. . . .' [Citing *Gravel* v. *United States, supra,* 408 U.S. at 627.]"

Thus judicial officers are not immune from criminal liability for conduct within the scope of their judicial duties. *Braatelien* v. *United States,* 147 F.2d 888, 895 (8th Cir. 1945); see also *United States* v. *Manton,* 107 F.2d 834 (2d Cir. 1939). State legislators are similarly subject to federal criminal liability for analogous conduct which falls within the prohibition of a federal criminal statute, as the Court stated in *O'Shea.*

Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence

and fearless discharge of duty on the part of the protected officials. While the federal speech or debate clause serves the same purpose, it has an additional, more fundamental purpose grounded in the separation of powers in the federal government. As the Court said in *Gravel* v. *United States, supra,* 408 U.S. at 616, 617:

> "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.
>
> . . .
>
> "[T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson,* 383 U.S. 169, 181 (1966). . . ."

There being no problem of separation of powers between the federal executive (represented in this case by the United States Attorney) and a state legislature, the Constitution itself does not create an immunity for state legislators as it does for members of Congress. I see no need for the courts to do so either. Nothing in our history or in the authorities relied upon by the court in this case suggests that there is a threat of federal executive interference with the independence of state legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries. Accordingly, I would hold that the state legislator's official immunity does not extend to liability under federal criminal statutes, and that he therefore has no commensurate official[2] privilege against disclosure.

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[2] He has of course the same privilege against self-incrimination that any other citizen has. He has not chosen to assert that privilege in this case.

In questioning the view that the existence of the privilege should depend upon whether there is a corresponding immunity, the majority states in footnote 5 that "[a] member of Congress is not immune from prosecution on charges of bribery or conflict of interest," and "[yet] the prosecutor is prohibited from attempting to prove those offenses by questioning the congressman about the motives for his legislative acts," citing *Brewster* and *Johnson*. This overlooks, I believe, an important distinction made in *Brewster*. As I understand that case, it did not hold that conduct which is not protected by an immunity from liability may nevertheless be privileged from inquiry. Brewster was charged with taking bribes in return for being influenced in respect of his official acts and with taking a bribe for an official act already performed by him. The Court held that the speech or debate clause permitted the government to prosecute those charges, because it could be done without inquiring into "the legislative acts of the defendant member of Congress or his motives for performing them." 408 U.S. at 526, quoting from *Johnson, supra,* 383 U.S. at 185. See also 408 U.S. at 527. The Court said:

> "There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526.

On the other hand, prosecution for legislative acts and inquiry into those acts or their motives, would have been prohibited by the speech or debate clause. Since bribe taking, however, was not protected by the speech or debate clause, the Court held that "inquiry into [such] activities"

was not prohibited by the speech or debate clause. 408 U.S. at 528. In other words, for those acts for which there was no immunity, there was likewise no testimonial privilege. Thus *Brewster* shows that the immunity and the privilege are correlated.

The majority further states in the same footnote that the testimonial privilege for state legislators "rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives," citing *Tenney* v. *Brandhove*. I do not believe *Tenney* supports the view that state legislators have a speech or debate immunity derived from the Federal Constitution. See p. 14 above. If they do not, and if I am correct that the doctrine of official immunity leaves state legislators criminally liable under federal law for even their legislative acts, I cannot believe they are privileged (unless they choose to avail themselves of their fifth amendment right) to withhold testimony concerning acts for which they may be prosecuted.

In reaching the conclusion expressed in this concurring opinion, I have assumed that the Mail Fraud Act (18 U.S.C. § 1341) and the Hobbs Act (18 U.S.C. § 1951) extend to conduct of a state legislator in the performance of his official duties. It would be inappropriate, if not beyond our jurisdiction, to pass on the sufficiency of the indictment in this interlocutory appeal of an order suppressing evidence. *Cf. United States* v. *Merritts,* ..... F.2d ....., No. 75-1198, Slip Op., p. 4 (7th Cir. 1975). Moreover, it is unnecessary to consider the scope of those statutes in order to decide this appeal: applying the approach of *Tenney* and *Pierson,* determining whether the doctrine of official immunity shields given legislative con-

duct is only a preliminary step in resolving the ultimate question of whether Congress intended a statute to apply to that conduct. It is accordingly unnecessary to reach that question in order to decide this case.

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Clerk of the United States Court of Appeals for the Seventh Circuit

No. 75-867

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the admissibility of a document introduced as a business record, argues that the exercise of federal jurisdiction was inappropriate in this case, and contests the sufficiency of the evidence against him.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and on

seventeen counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent five-year prison terms and fines totaling $27,000. The court of appeals, in a thorough opinion upon which we rely (Pet. App. 1-52), affirmed petitioner's conviction on all but three counts.

1. Petitioner was an Alderman representing Chicago's Thirty-First Ward and was Chairman of the City Council's Committee on Finance. He was charged with having devised a scheme through which, by virtue of his official position, he was able to acquire and resell for a profit significant amounts of real estate. The transactions involved in the scheme were facilitated by mailings, which constituted the basis for the individual mail fraud counts.[2]

The government charged that petitioner had defrauded the city of his services as an alderman, by using inside information to determine in which areas the city would be purchasing land, by introducing and voting on property assessment clearances without disclosing to his fellow aldermen his interests in the lands involved, by voting without disclosure to authorize the city to purchase certain lands in which he had an interest, and by using his influence to induce various city agencies to purchase his lots.

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[1] Three other counts were dismissed by the government at the conclusion of its case-in-chief.

[2] The individual mailings and their relation to the scheme are discussed in detail in the opinion of the court of appeals (Pet. App. 30-35).

The evidence at trial, which is set forth in the opinion of the court of appeals, showed that pursuant to a local statute, Cook County held a "scavenger sale" of tax delinquent properties in June of 1966. Seeking to purchase such properties, petitioner formed a partnership with co-conspirators John Hennessey, Sr., and Nathan Schwartz. The partnership, named Alpine Investments, in turn arranged for the establishment of Chicago Title and Trust land trust No. 53129, into which parcels acquired were to be placed.

Prior to the scavenger sale, petitioner assisted Hennessey in determining which properties should be acquired by the partnership. Among those decided upon were lots in the 87th and Mackinaw area, where petitioner knew that the government would soon build a large project.[3] Alpine secured some 1900 parcels of property from the sale.

In order to obtain clear title to the purchased properties, it was necessary for Alpine Investments to remove special assessment liens against the parcels. This petitioner accomplished in two ways. On those lots for which there were still outstanding bondholders, it was necessary to cause foreclosure proceedings to be instituted. Accordingly, a "Request for Foreclosure of Special Assessment Liens" was filed with the staff of the Subcommittee on Special Assessments, a subcommittee of the Committee on Finance of the City Council.

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[3] Each partner contributed $100,000 to the venture and another $300,000 was obtained from a local bank.

Petitioner was Chairman of the Committee on Finance, and Alderman Fifielski was Chairman of the Subcommittee, a position to which petitioner had appointed him. It was the responsibility of the Subcommittee on Special Assessments to set minimum bids to be made by the applicants for foreclosure of liens, and, in practice, the minimum bid set by the Subcommittee invariably ended up as the purchase price. The Subcommittee usually set the minimum bids at 30 to 60 percent of the amount due on the bonds; the minimum bids on petitioner's properties, however, were set at ten percent of the amount due.

In the case of lots for which the original bonds had been redeemed, title to petitioner's properties was perfected by forwarding "Compromise Offers in Lieu of Foreclosures" to the Subcommittee on Special Assessments. The action of the Subcommittee on both the "Requests for Foreclosure" and the "Compromise Offers" was placed in the report of the Finance Committee—a report which petitioner introduced before the full City Council. These matters were placed in an omnibus bill and voted upon at the end of each day along with other matters.

Petitioner voted favorably upon such bills on numerous occasions, but he never disclosed to the other aldermen his interest in the properties involved. Many of the council members who voted favorably on the bills testified at petitioner's trial that they would have voted against the proposals, or at least

demanded further investigation, had they been aware of petitioner's interest.[4]

Having thus unemcumbered the Alpine properties, petitioner then used his position on the City Council to dispose of the lots, in the following manner:

(a) In May of 1968, petitioner voted in the City Council to authorize the Chicago Housing Authority to acquire properties in certain parts of Chicago in which Alpine properties were located. He did not disclose his interest in the matter voted upon. After the Housing Authority was authorized to make such acquisitions, petitioner called Charles Swibel, its chairman, and urged him to purchase Alpine properties; ultimately the Housing Authority bought 60 of the Alpine lots in those areas.

(b) The Chicago Dwelling Association was a nonprofit corporation, for which the Chicago Housing Authority acted as a purchasing agent. Charles Swibel was also Chairman of the Dwelling Association. When co-conspirator Hennessey initially tried to persuade the Chicago Dwelling Association to purchase certain lots, he was told that they were improperly zoned. In a letter to the individual in charge of land acquisitions for the Chicago Housing Authority (Robert Snow), Dwelling Association attorney Gerald Broderick indicated that Executive Director Ira Bach had told him (Broderick) that Swibel wanted the five Alpine lots purchased "as swiftly as possible."

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[4] Because the land was held in the name of trusts, petitioner's interest in the parcels was not apparent.

Snow declined to make the purchase, but soon thereafter, the Chicago Dwelling Association purchased the lots. The letter to Snow was written the same summer that petitioner had asked Swibel to purchase some of Alpine's lots.

(c) In late 1969, the Metropolitan Sanitary District threatened condemnation on certain Alpine lots, offering to purchase them for $150 per lot. Thereafter, there was a meeting among petitioner, Robert Wiss, an attorney for the Metropolitan Sanitary District, and Harry Rubenstein, an attorney for Alpine. Subsequently, the Metropolitan Sanitary District purchased the land in question for $775 per lot.

(d) In January of 1967, petitioner voted on the City Council to designate the 87th and Mackinaw area, in which he had purchased lots, as a "slum and blighted" area, thereby authorizing the Chicago Department of Urban Renewal to acquire properties there. Petitioner never disclosed his interest in the area, and the Department of Urban Renewal eventually bought three lots of Alpine.[5]

2. Petitioner challenges the admission, as a business record under 28 U.S.C. 1732(a), of a letter-memorandum written by Gerald Broderick, an attorney for the Chicago Dwelling Association (Pet. 16-23). He contends that because the letter contained hearsay statements, it violated his Sixth Amendment right of confrontation.

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[5] The Alpine partnership sold other lots to private interests, also at a profit (Pet. App. 13).

The memorandum was introduced by the government as part of its proof that petitioner had successfully used his position to induce Swibel, as chairman of the Chicago Housing Authority and the Chicago Dwelling Association, to cause those agencies to purchase some of the Alpine properties. The relevant portion of the letter, which was directed to Robert Snow, land acquisition director for the Housing Authority, read: "Mr. Bach [Executive Director of the Chicago Dwelling Association] informed me [Broderick] that Mr. Swibel told him to purchase these lots as swiftly as possible" (Gov't. Exh. 14-2A).

At trial, petitioner stipulated that he had "no question as to the authenticity of the documents" and recognized that "they are business records and kept in the regular course of business * * *" (Tr. 1444-1445; see also Tr. 1363). It was also established that it was the regular course of the business of the agencies involved to keep memoranda of purchasing plans and that, as the court of appeals noted (Pet. App. 45), "Broderick's letter was contemporaneous with Bach's report to him and there appears to have been no motive to misrepresent on the part of either Bach or Broderick."[6] In these circumstances, the foundation necessary for admission un-

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[6] The foundation necessary for admission under the business records exception of 28 U.S.C. 1732(a) has three requirements: that the record was made in the regular course of business, that it is the regular course of the business involved to make such records, and that the record was made contemporaneously with the event or shortly thereafter.

der the business records exception to the hearsay rule was established, and the Broderick letter was therefore properly admitted in evidence under 28 U.S.C. 1732(a).[7]

In any event, the admission of the single Broderick letter, even if error, was harmless in view of the overwhelming evidence of petitioner's guilt introduced during the month-long trial. Petitioner's scheme to defraud involved the use of inside information, voting on matters of personal interest without disclosing that interest, and the use of undue influence. The Broderick letter went only to the undue influence part of this scheme and was cumulative even as to that, for other evidence showed that petitioner had personally called Swibel and secured the purchase of some 60 lots by the Chicago Housing Authority.

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[7] The cases cited by petitioner purporting to limit the use of the business records exception are inapplicable here. In *Phillips* v. *Neil*, 452 F.2d 337, 347-348 (C.A. 6), a medical record was inadmissible because no reason was shown why the author was unavailable at trial, the identity and qualifications of the author were not disclosed, and the record contained a variety of conclusory statements about the defendant's insanity, an issue ultimately for the jury. In *United States* v. *Beasley*, 513 F.2d 309, 314 (C.A. 5), the documents were found not to be business records under 28 U.S.C. 1732 and to exhibit no guaranty of truth. Finally, in *United States* v. *Burruss*, 418 F.2d 677, 678 (C.A. 4), some of the entries in the record were not reported by individuals in the regular course of their business (citizen's reports of thefts to the police).

3. Petitioner claims (Pet. 24-28) that federal jurisdiction was improperly invoked in this case because his activities were local in nature and because the mail fraud statute was not intended to allow "federal oversight or intervention" in such matters.

Petitioner misconceives the nature and purpose of 18 U.S.C. 1341. That section is properly invoked not because of a federal interest in the underlying scheme, but because of the interest of the United States to preserve the integrity of the mails and "to prevent the post office from being used to carry schemes to defraud into effect" (Pet. App. 15). See *Parr* v. *United States*, 363 U.S. 370, 389; *United States* v. *Edwards*, 458 F.2d 875, 880 (C.A. 5); *United States* v. *Cashin*, 281 F.2d 669, 674 (C.A. 2). The mails were used to further the fraud of depriving Chicago, its council, and its citizens of petitioner's unbiased and disinterested services and judgment. The scheme therefore fell within the prohibition of Section 1341. See Pet. App. 25-29; *United States* v. *Barrett*, 505 F.2d 1091 (C.A. 7), certiorari denied, 421 U.S. 964; *United States* v. *Isaacs*, 493 F.2d 1124 (C.A. 7), certiorari denied, 417 U.S. 976; *United States* v. *States*, 488 F.2d 761 (C.A. 8), certiorari denied, 417 U.S. 909.

4. Petitioner finally urges (Pet. 23-24) that the government's evidence was "so insubstantial as to violate the standard required on review of criminal cases." However, the court of appeals, applying the proper standard, reviewed the evidence and concluded (Pet. App. 18):

With respect to the acquisition of a significant number of parcels in the 87th and Mackinaw area, the evidence in its form most favorable to the government showed that while discussing what properties to acquire at the scavenger sale, Keane told Hennessey to buy in this area because a "big government project" was going up. Subsequently, 30 parcels in this area were purchased.

Although the defense introduced evidence to show that discussions concerning urban renewal in this area had been going on for a decade, the government introduced evidence that it was not until August 21, 1966 (after the scavenger sale), that an announcement was made to the public that the area had definitely been designated to undergo study to see if it qualified for urban renewal. Thereafter, the area was designated by the City Council, with Keane voting in the affirmative as "slum and blighted" and the D.U.R. began acquiring land in the area including three lots in which the defendant had an interest.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Perhaps the most disappointing feature of the government's Memorandum (hereinafter cited as "Memo") is its attempt to oversimplify the prolix factual and legal issues involved in this case. In order to achieve this goal, it has been necessary for the government to misstate certain facts, rely on proof specifically rejected by the Court of Appeals to show undue influence, ignore the Confrontation Clause, and, ultimately, take refuge in the harmless error doctrine.

For clarity, we enumerate certain of those matters in the Memo which cause these concerns.

1. Apparently in order to magnify the extent and effect of Petitioner's alleged telephone conversation with Swibel (see Petition, pp. 8-9; T. 494-6; Pet.App., p. 10), the government states that Swibel, in addition to being Chairman of the Chicago Housing Authority (C.H.A.), was also Chairman of the Chicago Dwelling Association (C.D.A.). (Memo, p. 5) Swibel was not Chairman of the C.D.A. Nor did he hold any position in the C.D.A.'s executive or operating hierarchy. The only "evidence" that Swibel exercised any influence with respect to C.D.A. purchases was the Broderick letter, whose competency for the purpose of that showing is challenged on constitutional and evidentiary grounds. (See, *infra*, pp. 2-4; see Petition, pp. 16-23) Absent the Broderick letter's hearsay assertions, there was no evidence that Swibel influenced C.D.A.'s purchase of 5 Alpine lots, or that any lots were purchased as a result of Keane's calling Swibel. (See *infra*, p. 5)

2. The constitutional problems arising from the use of the Broderick letter have been largely ignored by the government. Thus, the letter is treated merely as an item of evidence, admissible under the business records exception to the hearsay rule,[1] but without regard for the ultimate purpose to which the letter was put. (Memo, pp. 7-8) This purpose—to show by Broderick's written, unsworn

[1] During trial, the government made a blanket offer into evidence of a number of files and documents as business records. As stated by the government (Memo., p. 7), trial counsel for Petitioner agreed that the documents were authentic and were business records. However, when the Broderick letter was individually brought forward to be proved up, specific objection was made that it contained hearsay statements not admissible under the business records exception to the hearsay rule. (T. 1460-61) Moreover, the trial judge specifically recognized that many hearsay statements were contained in the letter, but allowed that, "if they are relevant, they may be admitted." (T. 1464)

word, that Swibel had issued a directive to Bach, as allegedly reported by Bach to Broderick—violated the Confrontation Clause, which, as we have shown (Petition, pp. 16-23), cannot be equated with the hearsay rule.

Qualification of a document as a business record does not, of itself, dispense with the Confrontation Clause and permit admission into evidence for purposes clearly forbidden by that Clause and its underlying rationale. The interrelationship of the business records exception and the Confrontation Clause—the effect which one must necessarily have upon the other—requires a definition by the Court which the government, apparently, seeks to avoid.

In placing the hearsay rule in absolute congruency with the Confrontation Clause, the government takes refuge in the harmless error doctrine. (Memo, p. 8) In so doing, the government ignores the trial prosecutor's consistent assertion to the jury that Keane, a man with "clout", applied "pressure" and "pulls the strings." (Petition, p. 11)

The "undue influence" charge permeated the entire trial. It was used to taint all of the evidence. Indeed, the Broderick letter was blown up for use in closing argument and, of all the many documents admitted, stood alone before the jury on an easel while the government berated Keane's "influence" and "breach of public trust." As was stated by the Court in *Kotteakos* v. *United States*:

> "• • • [T]he question is, not were they [the jury] right in their judgments, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> • • •

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (328 U.S. 750, 764-5 [1945]; citations and footnote omitted.)

In the instant case, there was a departure from the constitutional norm—the Confrontation Clause was violated. Moreover, the Broderick letter was deliberately employed by the government in such a manner as to have maximum impact in swaying the jury. In such circumstances, regardless of what other evidence might exist to support the verdict, the Broderick letter was clearly intended to have substantial influence upon the jury.

There was yet a further vice in the use of the Broderick letter. The government, in arguing to the jury, cast serious reflection upon Swibel's character (T. 3373), despite its pretrial statement indicating that Swibel was not a co-conspirator. Yet, the government has refused to make available either Swibel's or Bach's grand jury testimony. Thus, no one has been able to test the government's claims concerning Swibel, or the truth of the matters asserted in the Broderick letter. (See Petition, 22-23)

3. The government claims for the first time here that C.H.A.'s purchase of 60 Alpine lots was related to and ultimately influenced by Petitioner's alleged telephone call to Swibel, the Chairman of C.H.A. (Memo, p. 8) Making

this claim at this juncture enables the government to argue now that the Broderick letter was cumulative. This should be compared to the government's position in both courts below, *where it was never claimed that undue influence was exerted in the C.H.A. transactions.* And the Court of Appeals did not find that undue influence was used in these transactions. (Pet. App. pp. 29-30) Thus, the premise for the government's cumulative argument is clearly without support in the Record.

The undisputed evidence regarding the C.H.A. transactions showed that Hennessey, Jr., independent of his father and Petitioner, learned that other scavenger sale purchasers were selling lots to C.H.A. (T. 1222, 2528-29) Because Alpine owned property in the area in which C.H.A. was buying from other scavenger sale purchasers, Hennessey, Jr. set out to join the parade. (T. 1223)

Junior negotiated exclusively with Charles Intrieri, a C.H.A. attorney. (T. 498, 772, 2529-30) Intrieri was not told that either Keane or Schwartz had an interest in the property. (T. 1160, 1223) Over a period of one to two years, Jr. negotiated with Intrieri 59 individual sales to C.H.A. In determining price, C.H.A. used only its own appraisals. Take-it-or-leave-it offers, sometimes below appraisal, were then made. (T. 1715, 772) Although Jr. regularly sought to obtain higher prices, he was unsuccessful on all but one occasion—when he received $100 more than was offered. (T. 2531-34)

At no time has the government contended that the price or terms of any C.H.A. purchase were unfair or excessive. Indeed, the lack of substantial evidence showing undue influence by Petitioner in sales to C.H.A., is underscored by the failure of the court below to discuss the issue. (See Pet.App., pp. 29-30)

4. The government refers to sales of properties to the Metropolitan Sanitary District[2] (M.S.D.) as though these sales were further indicative of fraud.[3] (Memo, p. 6) Property acquired by the M.S.D. from Alpine was at a price below M.S.D.'s own appraisal. (G.X. 17-1) In fact, the Seventh Circuit specifically found that the "evidence was insufficient to justify the conclusion that undue influence was used by" Petitioner in the M.S.D. acquisition of Alpine properties. (Pet.App., p. 30, footnote 29)

5. Attempting to sustain the finding below that Petitioner used "inside information," the government quotes the opinion of the Court of Appeals "that it was not until August 21, 1966 (after the scavenger sale), that an announcement was made to the public that the area [87th and Mackinaw] had definitely been designated to undergo study to see if it qualified for urban renewal." (Memo, p. 10)

On August 21, 1966, newspaper articles did report that a request was made for federal funds for a study to determine whether the area would qualify as an urban renewal project. (Tr. 1593-94) However, the appearance of this story cannot detract from the *undisputed* further evidence that, on November 28, 1965, (prior to the scavenger sale) the newspapers reported a press release by the Department of Urban Renewal:

> "A thirty-five block area on the southwest side known as Millgate, [the predecessor designation for the 87th and Mackinaw area] sometimes called one of the city's most rapidly deteriorating areas, soon will be studied for redevelopment by the Department of Urban Renewal." (T. 1604-05)

[2] M.S.D. is an independent Municipal corporation established by statute. Ill.Rev.Stat., 1975, Ch. 42. It is not an agency, nor does it use funds, of the City of Chicago. (T. 2347)

[3] However, at the conclusion of its case, the government dismissed, on its own motion, the substantive mail fraud charge based on a M.S.D. mailing.

This media report was followed by additional newspaper articles concerning meetings between representatives of the Department of Urban Renewal and community leaders to determine the nature of the urban renewal. (See, e.g., G. Ex. 16-11)

When Keane, in April 1966, told Hennessey to buy in the area, it was thus common knowledge, having been reported through the media, that the area was being studied for redevelopment. Small wonder the Seventh Circuit was led to conclude that the evidence concerning advance information was "not overwhelming." (Pet. App. p. 18) And yet, the confusion of the Seventh Circuit is even more evident when the paragraph immediately following those quoted in the Memo, (p. 10) is considered:

> "Although the evidence is not overwhelming on the use of advance information charge, and it is possible to interpret the evidence as representing shrewd business judgment on Keane's part, we cannot say that the jury was not entitled to believe that Keane made use of advance information to acquire substantial amounts of property in an area *prior to the public announcement indicating that the area was being considered for urban renewal.*" (Pet. App., p. 18; emphasis added)

The evidence showed exactly the opposite of what the Court of Appeals said it showed. The public announcement that the area was being considered for urban renewal came six months before the alleged Hennessey-Keane conversation as to what property to purchase. There was no evidence from any source that Keane had obtained any other advance information.

This is not the only instance of confusion existing between the evidence in the record and the opinion. (See, e.g., Petition, p. 8, fn. 5)

CONCLUSION

For the foregoing reasons, in addition to those heretofore recited in the Petition for Writ of Certiorari and the Supplement thereto, Petitioner respectfully requests that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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